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International Court of Justice

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Official transcript of the International Military Tribunal in the matter of the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering, et al, Defendants, sitting at Nurnberg, Germany, on July 19, 1946, 1000-1700, Lord Justice Lawrence, presiding.

DR. EXNER: (Counsel for defendant Jodl) Mr. President, may it please the Tribunal:

I shall continue with the reading of my final argument, continuing on page 7 in the middle of the page.

I should like to recall the fact that yesterday I tried to show that Jodl, in any event, up until the year 1939, was not a member of a conspiracy and could not have been -- correction, page 9.

But perhaps it is asserted that Jodl only joined the conspiracy after 1939.

As a previous speaker has already explained, an officer who coopertates in the place indicated for him in carrying out a war plan can never be considered a conspirater. He does, in fact, have a plan in common with his superior, but he had not adopted it willingly, nor has he concluded an agreement, but, within the normal order of service, he simply does whatthe post he occupies demands.

Jodl can be considered a typical example of this. He did not go to Berlin on his free decision. It had already been laid down long before that he had to enter the Fuehrer's staff in case of war. The arrangements for the current mobilization year laid this down. This mobilization year ended on the 30 Septebmer 1939; for the following year General von Sodenstern was already designated as Chief of the Wehrmacht Operational Staff. Therefore, if the war had broken out six weeks later, Jodl would have entered the war as commander of his mountain division. He would then, in all probability, not be on this defendants' bench today. One sees that his whole activity in the war was fixed by a ruling which was independent of his will and had been laid down in advancelong before. This fact is, in my opinion, in itself already striking proof that he did not participate in a conspiracy to wage wars of aggression.

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When Jodl reached Berlin on the 23 of August, 1939, the beginning of the war hadalready been laid down for the 25 of August. For reasons unknown to him it was then postponed another six days.. The plan for the Polish campaign lay ready. He did not need to conspire to produce it. If a conspiracy against Poland existed at that time, the co-conspirators were quite somewhere else, as we now know as a result of the secret German-Russian treaty.

Jodl was not introduced to the Fuehrer until the 3 September 1939, i.e., only after the war had begun, at a time when what had to be decided had already been decided.

From then on his official position brought him close to Adolf Hitler. One must actually add, close to his physically only. He wasnever really close to him. Now, too, he did not learn Hitler's plans and intentions, and was only let into them as the occasion arose, to the extent that his work absolutely demanded. Jodl never became Hitler's confidant and never had cordial relations with him. It remained a purely official relationship--and often enough one of conflict.

In other ways, too, Jodl had remained a stranger to the party. There is no idea of his having sought contact in Vienna, for instance, with the party leaders there, although this would have been natural enough.

Most of the party leaders and most of the defendants he came to know only when they visited the Fuehrer's Headquarters from time to time. With the exception of the officers, he continued to have no relations with them. The party clique in the headquarters he hated and considered it an unpleasant foreign body in the military framework. He never ceased to fight against party influences in theArmed Forces.

He still did not participate in party functions. He did not participate in Reich party rallies, apart from the fact that he once watched the Wehrmacht's exhibition there, having been ordered to officially. He avoided every one of the Munich anniversaries on the 9 November.

The Prosecutor repeatedly brought in his Gauleiter speech to prove that, in spite of all this, Jold identified himself with the party and its efforts, and that he was, after all, not a soldier but a politician and that he was an enthusiastic supporter of Hitler's as well.

Here one must first note document L 172, which is presented to us as this

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Gauleiter speech, is not the manuscript of this speech out a collection of materials put together by his staff, on the basis of which Jodl then drafted his manuscript. Over and above this, the speech was made extemporaneously. Not a single word of this document proves that Jodl really spoke it.

Also the occasion of the speech must be taken into account. After four hard years of war, after the breaking off of Italy which had just taken place before the fresh, terrific burden which Hitler planned to impose on the population as the extreme effort, - at this critical moment everything depended on the people's will to continue remaining intact. For this reason, the party tried to get expert information upon the war situation so as to be able to buoy up the sinking courage again. For this task the Fuehrer earmarked General Jodl, no doubt the only competent person. Some people would have welcomed this opportunity to make themselves popular with the Party leaders, but Jodl accepted the task against his will. The title of the lecture is "The military situation at the beginning of the fifth year of war." Its contents are purely objective description of the war situation on the various fronts and of how this situation was created. The beginning and the end give at least according to the document before us, a paen of praise to the Fuehrer from which the Prosecution draws doubtful conclusions. When a lecturer has first and foremost to win the confidence of his listeners, these consisting of Party leaders, and when the task is to spread confidence in the supreme military leadership, then such rhetorical phrases are something quite understandable.

Besided, Jodl does not deny that he sincerdy admired some of the Fuehrer's qualities and talents. But he was never his confidant or his fellow-conspirator and he remained in the OKW the non-political man he always was.

Jodl was therefore not a member of a conspiracy. No concept of a conspiracy can help to makehim responsible for actions which he did not himself commit as a guilty man.

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And now I will deal with these individual actions with which Jodl is reproached.

According to Article 6 of the Charter, the Tribunal is competent to deal with certain crimes against the peace, against the laws of war and against humanity, which crimes are specified in the Charter and for which the personal criminal responsibility of the guilty individual was laid down. If we disregard for the time being the crimes against humanity, which come under a special heading, there are two preliminary conditions under which the individu punishment of the defendants can take place:

First, there must be a violation of international law of which they were co-guilty in some respect. The meaning of this whole trial and the meaning of the Charter after all lies in the fact that the force of the rules of international law is to be strengthened by penal sanctions. If, therefore, some special kind of violation of international law is committed, not only the responsibility of the particular country which violated the law will come in as heretofore, but in addition guilty individuals are also to be punished for it in future. Therefore: There can be no punishment without a breach of international law.

Second, but provision is not made for such a responsibility of individuals in the case of all breaches of international law, but only for thos which are explicitly named in the Charter. Article 6 (a) specifies the crimes against peace, paragraph 6 (b) crimes against the laws and usages of war. Other actions, even if they are contrary to International Law, do not belong here.

Quite a few court sessions could have been saved if the Prosecution had taken these two points into account right from the beginning, because as is to be shown, there is a tendency to accuse the defendants beyond these limits of actions contrary to international law which are not specified in the Charter; but this is not all: they are to be called to account also for deeds which are not at all contrary to law, but which can at most be considered as unethica

In the following points I shall adhere to the clear arrangement of the Anglo-American trial brief and add to it what was brought up against Jodl by the two other Prosecutors.

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Point one: The collaboration in the seizure and consolidation of power by the National Socialists has, as has already been pointed out, been dropped.

Points two and three concern rearmament and the reoccupation of the Rhineland.

Jodl had nothing to do with the introduction of general compulsory military service nor with rearmament. Jodl's diary contains not a single word about re-armament. He was a member of the Reich Defense Committee, which was not, however, concerned with the re-armament questions. He was here concerned with the measures which were to be taken by the civilian authorities in case of mobilization. There was nothing illegal in that. We were not forbidden to mobilise, for instance, in case of an enemy attack. The preparations in the demilitarized zone which were proposed to the Committee by Jodl limited themselves also to the civilian authorities and consisted only of preparation for the evacuation of the territory west of the Rhine in order to defend the line of the river Rhine in case of a French occupation. The preparations were purely of a defensive nature.

If, in spite of that, Jodl recommended that these defensive measures be kept very strictly secret, this is not evidence of any criminal plans, but only the natural thing to do. As a matter of fact, particular caution was imperative, for the French occupation of the Ruhr was still fresh in peoples' memory.

Neither had Jodl anything to do with the occupation of the Rhineland; he learned about it only five days before the execution of this decision of the Fuehrer's. Further statements are superfluous, for according to the Charter neither re-armament nor the occupation of the Rhineland -- whether they were contrary to international law or not -- belong to the criminal actions under Article 6.

These cases would come under the Charter only if a preparation for aggressive war was seen in them. But who would have thought of an aggressive war at that period? In 1938, owing to lack of trained troops, we could not have put into the field one sixth of the number of divisions our expected enemies, France, Czechoslovakia and Poland, could have produced. The first stage of re-armament was supposed to be reached in 1942. The Western Wall was

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to be completed by 1952. Heavy artillery was lacking entirely. Tanks were at the testing stage. The ammunition situationwas catastrophic. In 1937 we did not possess a single capital ship. As late as 1939 we did not have more than 26 seagoing U-boats, which was less than one tenth of the British and French figure. As far as war plans are concerned there existed only a plan for the protection of the Eastern frontier. The description of our situation in the Reich Defense Committee is very typical. It was said, in a matter of fact way, that a future war would be fought on our own territory; hence that it could only be a defensive war. This -- please note -- was a statement made during a secret session of this Committee. The possibility of offensive action was not mentioned at all. But we were then not capable of serious defensive action either. For this very reason the generals already thought of themselves as gamblers at the time of the occupation of the Rhineland. But that any one of them could have been sufficiently utopian to think an offensive -- there is not even the semblance of any evidence for such thinking.

As Points 4) - 6) the Trial brief designates participation in the planning and execution of the attack on Austria and Czechoslovakia.

A deployment plan against Austria did not exist at all. The Prosecution quoted the document C 175 as such. But this is a misunderstanding. It is merely a program for the elaboration of the most various war plans; for instance for the war against England, against Lithuania, against Spain, etc. Among those theoretical possibilities of war, the "Fall Otto" is also mentioned; that is an intervention in Austria in case of an attempt to restore the Habsburgs. It says in the document that this plan is not to be elaborated but merely to be "thought out". But, as there was no indication whatsoever of such an attempt by the Habsburgs, nothing at all was prepared for this.

Jodl did not attend the meeting on the 12 February 1938 at Obersalzburg. Two days later came the order to propose certain deceptive actions, obviously in order to put pressure on Schuschnigg so that he should comply with the Obersalzberg agreements. There is nothing illegal in this, even if the Prosecutor speaks about "criminal methods".

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Jodl was completely surprised two days before its execution by the Fuehrer's decision to march in. The Fuehrer gave this order to march in by telephone. Jodl's written order served only to file it. If this had been the authoritative order, it would after all have come much too late. It was issued at 0900 hours on the 11 March and the march in took place on the following morning. Its course was described to us. The troops had purely peace-time equipment. The Austrians crossed the border to meet and welcome them. Austrian troops joined the columns and marched with the German troops to Vienna. It was a triumphal procession with cheers and flowers.

The case of Czechoslovakia follows.

As late as the spring of 1938 Hitler stated that he did not intend "to attack Czechoslovakia in the near future." After the partial Czech mobilization, which was unprovoked, he changed his view and decided to solve the Czech problem after the 1 October 1938, and not on the 1 October 1938, as long as there was no interference to be expected from the Western Powers.

Jodl was therefore to make the preparations concerning the General Staff. He did it in the conviction that his work would remain theoretical because -- as the Fuehrer wanted under all circumstances to avoid a conflict with the Western Powers -- a peaceful settlement was to be expected. Jodl tried to achieve only one thing -- that the plan should not be interfered with by Czech provocation. And really things happened as he expected they would. After the examination by Lord Runciman had shown the untenableness of the racial conditions in Czechoslovakia and the justification of the German national point of view, the Munich Agreement with the Western Powers took place.

Jodl is reproached with having proposed in a memorandum that an incident might be organized as a motive for marching in. He has given us the reasons for it. But the incident did not take place. This memorandum is not a breach of international law, even if only because it is a question of internal considerations which never achieved importance outside. And even if this idea had been put into execution, such guiles have always been used, every since the Greeks built their Trojan Horse. Ulysses, the initiator of this idea, is praised for this by the ancient poets as "a man of great cunning" and not branded as a criminal. I do not see anything unethical in Jodl's behaviour

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either, for, after all, in the relations between states somewhat different ethical principles are applied from those in boarding schools for young Christian girls.

The occupation of the Sudetenland itself was carried out just as peacefully as that of Austria. Greeted enthusiastically by the liberated population, the troops entered the German areas, which had been evacuated to the agreed line by the Czech troops. Both these marchings in are not crimes according to the Charter They were not attacks (this presupposes the use of force) still less wars (they presuppose armed fighting), let alone aggressive wars. To consider such peaceful

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invations as "aggressive wars" would be to exceed even the notorious conclusion based on analogies of National Socialist criminal legislation. The four signatory powers could have included these invasions, which were still a recent memory, in Article 6, but this was not done because it was obviously intended to restrict the completely new kind of punishment of individual persons to wars, but not to penalize such unwarlike actions. Quite generally speaking, it must be said: any interpretation of the penal rules of the Charter which extends them is inadmissible. The old saying applies: "privilegia stricte interpretenda sunt". Here we have an example of privilegium odiosum. Indeed there has probably never been a more striking example of a privilegium odiosum than the unilateral prosecution of members of the Axis Powers only.

Now one could also get the idea of making Jodl responsible for having drafted an invasion plan against Czechoslovakia at a time when a peaceful settlement was not yet ensured. But Jodl reckoned with a peaceful settlement and had good reason to expect it. He therefore lacked the intention of preparing an aggressive war.

To this statement of facts which exclude Jodl's guilt must be added a legal consideration: We have decided - and there should be no doubt about it: There is no punishment for crimes against the peace without a violation of International Law. Now if the Charter makes preparations for aggressive war subject to punishment, it clearly means that a person who prepared an aggressive war which actually took place should be punished, On the contrary, war plans, which remained nothing but plans, do not belong here. They are not contrary to International Law. International Law is not concerned with what goes on in people heads and in offices. Things which are immaterial from the international point of view are not contrary to International Law. Aggressive plans which are not executed in the same way as mere aggressive intentions - may be unethical, but they not contrary to law and do not come under the Charter. It is here a question of plans which were not carried out because the

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peaceful occupation of the Sudetenland based on international agreement was not an aggressive war, and the occupation of the rest of the country, which furthermore was accomplished without resistance and without war, no longer had any connection with Jodl's plans.

This occupation of the rest of the Czechoslovak territory in March 1939 need not be discussed in greater detail here, for Jodl was at the time in Vienna and did not take part in this action, Neither did he have anything to do with its planning, for it has no connection whatsoever with Jodl's former work in the General Staff. Since then the military situation had changed completely; The Sudetenland with its frontier fortifications was in German hands. The unopposed marching in which then took place, therefore, followed totally different plans, if such plans existed at all. Jodl did not take part in this marching-in.

Point 7 of the Trial brief regarding war tension against Poland: the essential things have already been said on this subject: At the moment when Jodl left Berlin, no deployment plan against Poland existed. When he returned on the 23 August 1939 the intention existed to enter Poland on the 25th. The plan for this was naturally ready; Jodl did not have a share in it.

The prosecution stresses further that Jodl was present in Poland in the Fuehrer's train on the 3rd September and that this was a proof that he took part in the war. Is this, too, a reproach against a soldier?

Point 8 of the Trial brief concerns attacks on the seven countries from Norway to Greece. The Trial brief gathers these seven wars together into one point and quite rightly too. They form one unit, because all of them resulted with military necessity and with logical consequences from the Polish war and from England's interference. It is for this very reason that the fact that Jodl had nothing to do with the unleashing of the war against Poland is so important when judging him.

The historians will have to do a lot more research work before

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it is known how everything really came about. The only criterion for the judgment of Jodl's behaviour is how he saw the situation at its various stages, whether, according to that what he saw and knew. He considered Hitler's various decisions to wage war justified and to what extent he influenced developments. That is all that we are concerned with here.

In this connection, may it please the Tribunal, I should like to refer to the statements made by Dr. Siemers the day before yesterday, and therefore I shall omit the next following, but I should like to make an insertion at this point. It seems to be a statement regarding international law which is not contained in my manuscript.

In reference to the statements made by Dr. Siemers in this regard day before yesterday, in order to avoid any misunderstanding I should like to add the following:

1. There is not the slightest doubt that the merchant ships of a state at war may cross the neutral coastal waters. If its enemy, in order to prevent any traffic of that sort, mines the coastal waters, this fact is a clear breach of neutrality. Capital ships and battle ships have the right of passing through, insofar as they adhere to the rules which have been stipulated and do not participate in any combat action in the coastal waters. And if this applies even to capital and battle ships, it applies all the moreso to ships who are transporting prisoners of war.

2. The fact that a war is a war of aggression does not in any way influence the validity and application of the normal war and neutrality right. A contrary opinion would lead to absurd results and would serve only to become a grave-digger for the complete right of war. There would be no neutral states, and the relations between the belligerents would be dominated and determined by the principles of brute force and its applications. Each shot would be murder, each instance of capture would be punishable deprivation of freedom, and each bombardment would be a criminal material damage.

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This war, in any event, was not carried on or conducted along such principles by either side, and even the Prosecution does not uphold the point of view.

THE PRESIDENT: Go on.

DR. EXNER: Nor does the Prosecution maintain this point of view, otherwise they would not have charged the defendant with certain deeds as being crimes against the laws of war and neutrality laws. The entire reproach under point three would be quite senseless and not understandable. And apart from that, Prof. Jahrreiss dealt with this question on Pages 32 to 35 of his final argument.

Now I shall continue on Page 30, the last paragraph.

Jodl heard for the first time in November, 1939 --and this from Hitler himself - about the fears of the German Navy that England intended to go to Norway. He then received information which left no doubt that these fears were basically right. He also had regular reports according to which the waters near the Norwegian coast were coming more and more into the English sphere of domination, so that Norway was no longer actually neutral.

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Jodl was firmly convinced - and still is today - that the German troops prevented the English landing at the last minute. No matter how Hitler's decision may be judged legally, Jodl did not influence it; he considered the decision justified and was bound to consider it as such. So, even if one wished to regard Hitler's decision as a breach of neutrality, Jodl did not give criminal help by his work on the General Staff.

(b) Belgium-Holland-Luxemburg.

Like every military expert, Jodl knew that if Germany was to fight the war in the West to its conclusion, there was no other course but a military offensive. In view of the inadequacy of the German equipment at the time and the strength of the Maginot-Line, there was, however, from a military point of view, no otherpossibility for an offensive than through Belgium.

So Hitler was, for purely military reasons, faced by the necessity of operating through Belgium. But Jodl also fully knew, as did every German who experienced August, 1914, how difficult a political decision was faced thereby as long asBelgium was neutral, i.e., was prepared and in a position to keep out of the war.

The reports which Jodl received, and against the accuracy of which no justified doubts could arise now, showed that the Belgian Government was already co-operating, in breach of her neutrality, with the general staffs of Germany's enemies. This, however, can be dropped here in the defense of Jodl. It suffices to know -- and this is indisputable -- that part of Belgium's territory, i.e., the air over it, was being continuously used by Germany's Western enemies for their military purposes.

And this applies perhaps even more strongly to the Netherlands. Since the very first days of the war, British planes have flown over Dutch and Belgian territory as and when they pleased. Only in some of the numerous cases did the Reich government protest, and these were 127 cases.

THE PRESIDENT: Dr. Exner, will you refer the Tribunal to the evidence which you have for that statement?

DR. EXNER: Please?

THE PRESIDENT: Will you refer me to the evidence that you have for that statement?

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DR. EXNER: What statement, Mr. President?

THE PRESIDENT: That protests were made in 127 cases.

DR. EXNER: I am referring to the statements made by the witness von Ribbentrop. He was the one who said that 127 protests went out.

THE PRESIDENT: Go on.

DR. EXNER: The prosecution does not put the legal question correctly. Before air warfare gained its present important position, conditions were such that a state which wished to remain neutral could withhold its territory from continual military use by one of the belligerents as and when the latter wished, or else give clear notice of the termination of its neutrality. Since air warfare became possible, a state can hand over, to have to hand over, to one of the belligerents the air over its territory and yet remain outwardly and diplomatically neutral. But, by the very nature of the idea, the defense of its neutrality can be claimed only by a state whose whole territory lies, de facto, outside of the theatre of war.

The Netherlands and Belgium were, long before that 10th of May, 1940, no longer de facto neutral, for the air over them was, in practice, with or against their will, freely at the disposal of Germany's enemies. What contribution they thus made towards England's military strength, i.e., towards the strength of only one of the belligerents, is known to everybody. It is necessary only to think of Germany's Achilles' heel: The Ruhr.

Our adversaries clearly maintained the point of view that, when the barrier constituted by Holland and Belgium protected our industrial areas against air attacks, their neutrality was to be disregarded; but when it protected France and England, its violation was a crime.

Jodl naturally realized the situation. His opinion on the legal question, was, of course, a matter of complete indifference to Hitler.

THE PRESIDENT: One moment, please.

Dr. Exner, is it your contention that it is is accordance with international law that if the air over a particular neutral state is made use of by one of the warring nations, the other warring nation can invade that neutral state without giving any warning to the neutral State?

DR. EXNER: In this connection, Mr. President, I should like to say that this continuous use of the air space of a state -- that is, for the purpose of attacking; having these planes over this territory with the idea of

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attacking Germany--was a breach of nuetrality. This breach of neutrality justified the fact that Germany would not considerBelgium a nuetral country any longer. Therefore, from the standpoint of the Kellogg Pact, or any previous assurance given with respect to neutrality, there cannot beany reproaches heaped upon Germany in this respect. Whether one can reproach Germany with the fact that she did not declare war, that is something I do not wish to deal with.

Presumably, the flights made by the British planes were not announced in advance either.

THE PRESIDENT: Well then, you are not prepared to answer the question I put to you?

DR. EXNER: The question was to this effect, Mr. President, whether a prior declaration was necessary. That was the question, Mr. President, wasn't it?

THE PRESIDENT: Whether you can attack a neutral state without giving any prior warning, that is, whether, in accordance with international law, you can attack a neutral state in such circumstances without giving any prior warning. That is the question.

DR. EXNER: The assertion is to the effect that it was no longer a neutral State, Mr. President. When it was attacked it was no longer a neutral state.

THE PRESIDENT: Then your answer is in the affirmative; you say that you can attack without giving any warnings, is that right?

DR. EXNER: There is an agreement in international law that war is always to be declared in advance. In that respect, Germany would have been obligated to declare war beforehand. However, above and beyond that, because of the fact that this was a neutral state, I do not believe that there was an obligation in existence. I cannot see just why there should have been an obligation to this state, because this state had been neutral at one time.

THE PRESIDENT: Well then, you say that there is a general obligation to declare war before you actually invade. You don't say, do you, that the fact that Holland was a neutral state prevented that obligation attaching?

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DR. EXNER: That I do not wish to assume. A general obligation; yes; but I do not believe there was a special obligation, because of the former neutrality on the part of Holland and Belgium. I would not know how I could justify that, or what reasons I could give.

THE PRESIDENT: Go on.

DR. EXNER: Now I shall turn to point (c), Greece.

Hitler wanted to keep the Balkans out of thewar, but Italy had attacked Greece against his will at the beginning of October, 1940. When the Italians got into trouble a request was made for German help. Jodl advised against it since English intervention in the Balkans would then have to be reckoned with and every hope of localizing the Italo-Greek conflict would thus be lost. Hitler then ordered everything to be prepared for the necessity which might perhaps nevertheless arise, if German help for Italy against Greece became inevitable (Orders of the 12th November and 13 December, 1940).

If the attempt to localize the Greek-Italian conflict did not succeed, it was clear that Greece would be involved in the Great German-English struggle. The question was now whether her territory would lie within the war zone controlled by the British or the Germans. And as in the case of Norway, Belgium, and Holland, part of the territory of these countries was already at England's disposal before the beginning of open hostilities, and they were, therefore, de facto at least, no longer neutral -- and perhaps could no longer be neutral, so it was also with Greece now. The prosecution, on Greece, established that British troops were landed on the Greek mainland on 3 March 1941, after Crete had, already some time before that, come within the area controlled by the British. Hitler did not give permission for aerial warfare at Crete until 24 March 1941, and began the land attacks only on 6 April.

Here, too, Jodl had no influence on Hitler's decisions. He could have no doubt that Hitler's decision was inevitable as the war between the world powers was now developing. There was no choice; ever-increasing parts of Greek territory would have been drawn into the sphere of English power and would have become the jumping-off points for bombing squadrons against the Roumanian oil-fields had Germany not stopped this process. Moreover, the experiences of the first World War were frightening; the coup de grace was

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then made from Salonica.

(d) Yugoslavia.

Hitler wanted to keep Yugoslavia out of the war too. The German troops in the Balkans had the strictest orders to respect its neutrality rigorously. Hitler even declined the application by the Chief of the Army General Staff to askthe Yugoslav Government for permission to let sealed trains with German supplies through their territory.

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The Simovic putsch in Belgrade on the night after Yugoslavia joined the Tripartite pact was considered by Hitler as a malicious betrayal. He was of the opinion that the change of Government at Belgrade, which altered the course of its foreign policy 180 degrees, was only possible if England or the Soviet Union or both had provided cover from the rear. He was now certain that the Balkans would be fully drawn into the war tangle. He was certain that the German troops in Bulgaria were directly threatened and also the German Line of Communication which ran close to the Yugoslav frontiers.

Under these conditions, Hitler took the decision for war on the morning following the Belgrade putsch, any separation from which was absolutely lacking. Jodl's suggestions, and later Ribbentrop's, too, to make things unambiguous by means of an ultimatum, were not considered at all. He wanted to make sure that Yugoslavia and Greece should not come into the sphere of influence of England but into that of Germany. The next day's news concerning Moscow's telegram of friendship to the Belgrade Putsch Government and about the Yugoslav deployment then already in progress, as confirmed by the statement of General von Greiffenberg, Doc. book III. A J. 12 (Jo.65) and lastly the Russo-Yugoslav Friendship pact were for Jodl irrefutable signs that Hitler had seen the connection of events correctly.

The decision to fight was taken by Hitler, and by Hitler alone.

Point 9 of the trial brief concerns the Soviet Union. What each of the two Governments, that of Berlin and that of Moscow, wished to achieve by the agreement of the 23-8-1939 is today not certain. One thing is, however, certain and that is that these partners who were up till then enemies, had not entered into a marriage of love. And the Soviet Union was for the German partner a completely mysterious quantity. And it remained so, too. Anyone who does not consider this fact can in no way judge Hitler's decision to make a military attack on the Soviet Union, and above all the question of guilt.

If anywhere, it was in the Russian question that Hitler came to a decision without listening to the slightest advice from anyone to say nothing of taking it. He wavered for many months in his opinion about the intentions of the Soviet Union.

The relations of the armies of both sides on the demarcation line were from the very beginning full of incidents. The Soviets at once occupied the

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territories of the Baltic States and of Poland with disproportionately strong forces.

In May and June 1940, when there were only 5 to 6 German covering divisions in the East, the Russian Deployment against Bessarabia with at least 30 divisions, reported by Canaris, and the deployment into the Baltic territory caused great anxiety. On the 30th June 1940 apprehensions were again aired so that Jodl -- as the Document PS 1776 has shown -- even thought that Russia could be counted on as a helper in the fight against the British Empire. But in July there were renewed worries. The Russian influence was advancing energetically in the Balkans and the Baltic territories. Hitler began to fear Russian aggressive intentions as he told Jodl on the 29th July.

The sending off of several divisions from the West, where they were no longer required, actually had nothing to do with this. It occurred at the request of the Commander-inChief in the East who could not fulfil his security task with his weak forces.

Hitler's worry concerned above all the Rumanian oilfields. He would have liked most to eliminate this threat already in 1940 by a surprise action. Jodl replied that, owing to the bad deployment possibilities in the German Eastern territories, this could not be considered before winter. Hitler demanded veritification of this opinion. Jodl arranged for the necessary investigations in a conference with his Staff in Reichenhall, which was obviously misunderstood by the Russian prosecution. On the 2nd August Hitler ordered improvements to be made in the deployment possibilities in the East -- a measure which was no less indispensable for defence than for an offensive.

Towards the end of August -- this is the order of the 27th August -- 10 Infantry Divisions and 2 Panzer Divisions were brought into the Government-General in case a Blitz action should become necessary for the defence of the Rumanian oilfields. The German troops, now totalling 25 divisions, were certainly intended to appear stronger than they really were, so that an action should be unnecessary. This is the sense of Jodl's order for counter-espionage (PS 1229). Had there been offensive intentions then, there would rather have been an attempt to make one's own forces appear smaller than they were.

At the same time Hitler appears to have given the General Staff

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of the army orders -- without Jodl knowing anything about it -- to prepare an operational plan against Russia for any eventuality. In any case, the General Staff of the army worked on operational plans of this kind from the fall of 1940 onward (General Paulus).

Unfavourable information then accumulated after the Vienna award on the 30th August 1940. If Jodl was to believe his utterances, Hitler was becoming convinced that the Soviet Union had firmly resolved to annihilate Germany in a surprise attack while she was engaged against England. The leaders of the Red Army had, according to a report of the 18th September, declared a German-Russian war to be inevitable (Doc. C 170). In addition, reports came in of feverish Russian preparations along the demarcation line. Hitler counted on a Russian attack in the summer of 1941 or winter of 1941/42. He thus decided, should the discussions with Molotov not clear up the situation favourably, to take preventive steps. For then the only chance for Germany lay in offensive defence. For this eventuality, preparatory measures were ordered by Hitler on the 12-11-1940 (PS 444).

The failure of the discussions with Molotov decided the question. On 18 December 1940 Hitler ordered the military preparations. Should the next months clear up the situation, all the better. But it was necessary to be prepared in order to deliver the blow in the spring of 1941 at the latest. This was presumably the latest possible moment, but also the earliest, since more than four months were required for the deployment.

Jodl, as an expert, emphatically pointed out to Hitler the enormous military risk, the undertaking of which could be decided upon only if all political possibilities of averting the Russian attack were really exhausted. Jodl came to the conclusion at that time that Hitler actually had exploited every possibility.

The situation grew worse. According to the reports which were received by the Army General Staff, at the beginning of February 1941, 155 Russian divisions, i.e. 2/3 of the total Russian strength known to us, had deployed opposite Germany. But the first stage of the German deployment had just begun.

The Government's telegram of friendship to the participants in the Belgrade Putsch on the 27 March 1941 destroyed Hitler's last hope. He decided upon an attack, which actually had to be postponed for more than a month owing to the Balkan war.

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The deployment was undertaken in such a manner that the fast German Units, without which the attack could not be conducted at all, were brought to the front only in the last two weeks, i. e. after the 10th June.

Real preventive war is one of the indispensable means of self preservation, and was indisputably permitted according to the Kellog-Briand-Pact. The "Right of Self-Defense" was understood thus by all the signatory states.

If the situation was wrongly conceived, the German military leaders are not to be blamed for their error. They had reliable reports on Russian preparations which could only have sense if they were preparations for war.

The reports were later confirmed. For when the German attack met the Russian forces, the leadership of the German front got the impression of running into a gigantic deployment against Germany General Winter developed this here in detail in addition to Jodl's statements, particularly with regard to the enormous number of new aerodromes near the line of demarcation, and he drew particular attention to the fact that the Russian staffs were provided with maps of German territories. Field Marshal von Rundstedt also confirmed this as witness before the Commission. This will come before the court during the further course of the trial.

Jodl firmly believes that Hitler would never have waged war against Russia unless he had been absolutely firmly convinced that no other path lay open for him at all. Jodl knew that Hitler knew the danger of a two front war fully and would risk the victory over England - which he thought was no longer in doubt - only in an inescapable emergency.

Jodl only did his job as an officer of the General Staff. He was convinced, and still is today, that we were waging a genuine preventive war.

Point 10 finally brings the war against the United States. That Jodl did not intend to increase the number of our enemies by a world power is obvious, and is also shown by documents. I am re-

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ferring to the German transcript pp. 10894 - 10 897). Now what is the position with regard to the responsibility for these campaigns? A declaration of war is a decision in the field of foreign politics, the most important one in the whole of this field.

It depends on the constitutional structure of the concrete state as to who is responsible for this decision - politically, criminally and morally; it depends on the way the formation of a will in the field of foreign politics takes place in this state according to its constitution. Prof. Dr. Jahrreiss has spoken about this:: in the Fehrer st it is exclusively the Fuehrer who has to make this decision. Anyone who advises him about this cannot be responsible, for, if what the Fuehrer orders has legal force, he who influences this order cannot be acting illegally.

The Charter is obviously of the opinion that those who in anyway participate in the Fuehrer's decision or influence it are also co-responsible. If we take this legal conception as authoritative the question of responsibility crystallizes into a problem of competence.

In every community the spheres of tasks of its organs must be delimited, there must be rulings on competence laying down what each official is called upon to do and not to do. Thus in all states the relations between the military and the civil administration is naturally regulated, as also within the military and within the administration the spheres of tasks and the relations between their thousands of offices are regulated. If things were otherwise, chaos would reign.

Particularly in wartime the problem of competence in the relations between the political and military leadership is important. For the military is the most important instrument of policy and the assistant may easily try to become master - the military interferes in politics. They had no right to vote, were not allowed to go to political meetings and in fact any statements on politics were looked upon askance. For it could in some way be looked upon

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as a taking of sides, whereas the taking of sides was severely banned. The military were to be politically blind, completely neutral and knowing only one point of view, which was that of legistimacy, i.e. subordination to the legitimate ruler.

Thus in the years 1866 a 1870, when there was danger of war, it was not moltke but Bismarck who advised the King as to the political decision. This changed during the last years of the first World War. General Ludendorff became the strongest man in the Reich owing to the force of his personality and the weakness of his political opponents. People often talk of German militarism. For the time when the soldier seized political power this was justified. The Weimar State got rid of this completely. The non-political character of the armed forces was stressed with all sharpness and the military again limited to its particular field. This went so far that a civilian was made Minister for war, who had to represent the armed forces politically in the Reichstag. For the longest time it was a Liberal-Democratic Minister, who was meticulously careful to avoid all political influence by the gener

When founding the Wehrmacht, Adolf Hitler maintained this sharp distinction between politics and military, indeed he even stressed it in a certain sense. He, who wished to make the whole people politically minded, wanted a non-political Wehrmacht. The soldier was deprived of political rights: He was not allowed to vote or to belong to any party, not even the NSDAP, as long as the old law on compulsory military service was in force. He also remained consistent towards his own party. When, after Fritsch had gone, as new Commander-in-Chief of the Army was to be appointe it would have been easy enough to have chosen Reichenau, who had National-Socialist leanings, but he appointed von Brauchitsch. He did not want any political generals, not even National Socialist ones. His point of view was that he was the Fuehrer and he the politician; the generals had to see to their own affairs; they knew nothing about politics. He did not even

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tolerate advice when it concerned politics. The generals did in fact, repeatedly venture to express doubts as to his political plans, but were obliged here to limit themselves strictly to purely military points of view.

This sharp division of political and military spheres of competence is, for that matter, not characteristically German. It applies also, if I see rightly, to Anglo-Saxon democracies, and indeed to a particularly strong degree.

At any rate it was so under Hitler: he made political decisions, and it was only on their military execution that the generals had any influence. It was their task to make the military preparations necessary for all political eventualities. But it was Hitler who pressed the button to set the machine in motion. The "whether" and "when" were decided by the Fuehrer. It was not for them to weigh the opportuneness, the political possibility or the legal permissibleness.

Psychologically this attitude of the Fuehrer became still more pronounced owing to the hardly comprehensible mistrust he felt towards his generals. A remarkable phenomenon, - anyone who disregards it can never come to understand the atmosphere which reigned in the Fuehrer's Headquarters. It was a mistrust - as he thought - of the reactionary attitude of the officers' cor. He never forget that the Reichswehr had fired at National Socialism in 1923. This was, moreover, the natural mistrust of a military expert, and also probab. the mistrust of the political expert towards political dilettantes in officers' uniform. This mustrust of the political outlook of his military entourage was moreover by no means entirely unfounded. For the generals had wanted to put a brake on his rearmament plans, to hold him back from the occupation of the Rhineland and had expressed objections to his march into Austria, and to his occupation of the Sudetenland! And yet all these actions had succeeded smoothly and without bloodshed. The generals felt like gamblers when carrying the plans out, but Hitler was sure of his game. Is it to be wondered at that their political judgment did not carry too much weight with him, and is it to be wondered at that, on the other side, the apparent infallability of his political judgment met with more and more recognition?

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Thus Hitler tolerated no interference in his political plans and the customs of it, as has been drastically represented to us here, was that, had a general raised objections to Hitler's political decisions, he would not actually have been shot, but his sanity would have been doubted.

To receive advice was not the concern of this man of power at all. Thus, at the beginning of military undertakings, the chances of the plan were hardly ever considered in general discussions. None of the important decisions since 1938 came as the result of advice. On the contrary, the decision often came as a total surprise to the military command. Thus it was, for instance, with the march into Austria, of which Jodl learned two days before, or in the case of the attack on Jugoslavia, which was suddenly decided upon by Hitler and carried out without any preparations within a few days. The alleged "discussions" at the Fuehrer's quarters, the course of which the witness Field Marshal Milch described so clearly, were nothing else but the "issuing of orders".

Within the Wehrmacht too, of course, the spheres of competence of the individual departments were sharply divided, and the method which Hitler used in order to make these divisions as insurmountable as possible is of interest. This was achieved by the method of secrecy. Enough has been said about this, particularly about the so-called "Blinkers order", which forbade anybody to get an insight into anybody else's work. It thus happened that each department was isolated and strictly limited to its own sphere of tasks. Obviously what Hitler desired to achieve by this system was that he should retain the reins in his hands as the only fully informed person.

Indeed, even more: he strengthened this system still more by only too often playing individual personalities, groups and departments off one against the other to prevent any conspiracy amongst them.

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DR. EXNER: Mr. President, I have concluded my paragraph.

THE PRESIDENT: We will adjourn now.

(A short recess was taken).

DR. EXNER: These methods of isolationism which I mentioned before, were interesting, because they often inevitably came into conflict with one of the basic ideas of National Socialism - the Fuehrer principle - but were carried through in spite of this. For instance, when the sphere of competence of two departments covered the same territory, such as perhaps the competence of a military commander and of Himmler in the same occupied territory. What was ordered by one did not concern the other, even though the carrying out of the order might encroach upon the arrangement for which the other was respnsible. Thus the military commander was in no way the master in his territory. Things were the same incidentally in the civil administration too: there was the duplication of the Landrat (prefect) as a state functionary and the Kreisleiter (district leader) as a party functionary of the Reich Governor, and the Gauleiter. Everywhere there was a dualism of powers and therefore a dissipation of power. There was method in this: it prevented lower organs becoming too strong and secured the power of the supreme leadership. It may be said epigrammatically that the Fuehrer principle was realized only in the Fuehrer.

What then was the position of Jodl's sphere of competence within all this machinery?

He was the chief of the operational staff of the armed forces, which was a department of the OKW coming under Keitel. Jodl's main task was, as the name of the departmentimplies, to assist the Supreme Commander in the operational leadership of the armed forces. He was the Fuehrer's adviser on all operational questions - in a certain sense the Chief of General Staff of the armed forces. The task of this chief of general staff in all countries in which this arrangement is known, is not that of giving orders but of advising, assisting and carrying out. Even if from this alone, it follows that Jodl's position has frequently been misunderstood during the course of this trial.

1.) He was not Keitel's chief of staff, but the chief of the most important department of the OKW, though he had nothing to do with the other departments and sections of the OKW.

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Here I have to make a concession which deviates from my written statement.

He was not Keitel's deputy. Keitel in Berlin was represented by the senior departmental chief and that was Admiral Canaris. At the Fuehrer Headquarters there was only the Operational Staff of the Armed Frces for which Jodl was reporting directly to the Fuehrer. The other sections of the OKW he had to do with.

2.) It is also wrong when J[illegible] is designated by the prosecution as the Commander of one campaign or another. He had no power of command, let alone being in command of an army.

3.) It was also wrong when it was repeatedly said that Warlimont was present at the meeting of the 23 May 1939 as Jodl's "representative" or assistant. Warlimont was in the OKW, at the time -- Jodl had left the OKW in October 1938 and had nothing more to do with Warlimont in May 1939.

What results from all this with reference to Jodl's responsibility for the real or alleged wars of aggression? In general, one can only be made responsible for what one does criminally whereas one should not do it, and for what one has criminally failed to do whereas one ought to have done it. What an officer or an official has to do or not do is a question of competence. So this is where the problem of competence assumes its importance for us. Let us look at it more closely:

Jodl is accused of having pl[illegible]d and prepared certain wars which were breaches of international law. This reproach is justified only if it was within his competence to examine, before he carried out his task, the legality of the war which might be waged and to make his co-operation dependent on this decision.

This must be very difinitely contested. Whether to wage a war is a political question and is the politician's concern. The question of how to wage war is the only question concerning the armed forces. The armed forces can suggest that the war is, in view of the opponent's strength, too risky or that the war can not be waged at a particular season, but the final decision rests with the politicians.

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I could in fact imagine that the chief of the Operational Staff of the Armed Forces would become at least morally guilty of complicity in a war of aggression if he had incited the decisive quarters to bring about a war, or if, drawing attention to military superiority, he had advised the political leadership to exploit the moment in order to carry out extensive plans of conquest. In such cases one could call him an accomplice, because he -- over and above his military task -- intervened in politics and provoked the decision for war. But if he plans and carries out the plan of war in eventu, i.e. in case the political leadership decide on war he does nothing also but his evident duty.

One should comsider the extraordinary consequences which would arise from a contrary conception: the competent authority declares war, and the Chief of General Staff, who regards this war as contrary to International Law, does not co-operate. Of the Chief of General Staff is luckily of the same opinion as the Head of the State, but one of the army commanders has objections and refuses to march, another one has doubts and has to think it over first. Can a war be waged at all in this case, be it a war of defense or a war of aggression

Such a conception of law would, in the future, lead to results which could not be vindicated at all. The Security Council of the Allied Nations has decided to set up a world police with the task of protecting world peace against aggression. And also the creation of a world General Staff has been considered which would have to plan and carry out this punitive war. Now let us imagine that the Securitty Council decides on a punitive war and the Chief of General Staff replies that, in his opinion, there is no aggression. Would not the whole Security apparatus in this case depend on the subjective opinion of a single non-political person, i.e. would it not in fact become illusory?

I only add one more thing in passing: If this opinion should prevail what efficient man would still decide to become a regular officer, if, on reaching a high position, he had to rish being put on trial for crimes against the peace in case of defeat?

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It is, for that matter, wrong, even if only for practical reasons, to impose on a General the duty of examining the legality of a war. The General will only seldom be in a position to judge whether the State to be attacked by him has broken its neutrality or whether it threatens to attack or not. And furthermore, the conception of a war of aggression and of war contrary to law is, as Prof. Jahrreiss has explained, still completely uncleared and contested among the practitioners and theoreticians of International Law. And now, a General, who lives far apart from all these considerations, is to recognize, that it is his duty to carry out a legal examination?

But even if he had recognized the war as illegal, just let us imagine the really tragic position in which this General would find himself. On one side is his evident duty towards his own state, which he particularly took an oath to fulfil as a soldier, on the other side this duty not to support any war of aggression, a duty which forces him to commit high treason, and desertion and to break his oath. One way or the other he will have to be a martyr.

The truth is this: As long as there is no superstate authority which impartially establishes whether, in a concrete case, such a duty does exist for the individual and as long as there is no superstate authority which will protect people who fulfil this duty against punishment for high treason and desertion, an officer cannot be held criminally responsible for a breach of the peace.

Under all circumstances a contradiction must here be pointed out, which the prosecution has fallen into: on one hand it reproaches the generals with not having been solely soldiers, but also politicians;on the other hand it demands of them that they should remonstrate against the pol itical leadership and sabotage its resolutions -- in short, that they should not solely be solders, but politicians.

The prosecution do actually acknowledge this up to a certain point. They say that it is not intended to punish the generals for having waged war -- for this is their task -- but they are reproached with having caused the war.

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And the second argument, which often recurs, is that without the generals as helpers, Hitler could not have waged these wars, and that makes them co-responsible.

This argument contradicts itself. For the help which the generals gave Hitler consisted in the planning and carrying out of the military operations, i.e. in waging the war, for which they can, in the opinion of the prosecution too, not be criminally accused. Let us look at this more closely. Jodl is said to have caused wars. It has been sufficiently proved that he played absolutely no part in the launching of the polish campaign. And it was this very campaign which, with strategic necessity, brought about all the further happenings.

Actually one need not examine the origins of the individual wars at all to be able to say, according to what we know now, that in this assertion there lies an enormous over-estimation of Jodl's power in the Hitler state. The resolution to start the war was far removed from his influence. Advice from the generals was not heard on this very point. At most, purely military considerations for and against could be submitted. And the Norwegian campaign was the only one of all these campaigns which a military man advised Hitler to carry out for reasons of strategic necessity. But that was not Jodl. As regards the latter, the assertion that he caused wars would be founded on nothing. Let the protocol, the memorandum, or any other document be shown according to which Jodl at any time incited people to war, or even only recommended the resolution to start a war. His Gauleiter speach is produced against him. In it Jodl shows -- looking back -- how the events developed out of one another. For instance, how the Austrian Anschluss facilitated action against Czecho-Slovakia, and how the occupation of Czecho-slovakia facilitated the action against Poland. But it is bad psychology to deduce from this that a general plan for all this existed from the first. If I buy a book which draws my attention to another one, and I then buy the latter as well, does it follow that at the time of the first purchase I already had the intention of getting the second one as well? If Hitler had extensive plans right from the start, Jodl did not know of them. let alone consent to them.

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His purely defensive deployment plan of 1938 already proves that by itself alone.

Every time a campaign had been resolved upon, he did indeed do his bit to carry it out successfully. It is this supporting activity which is the object of the second of the arguments mentioned earlier.

It is true that without his generals, Hitler could not have waged the wars. But only a layman can build up a responsibility on that. If the Generals do not do their job, there is no war. But one must add: if the Infantryman does not march, if his rifle does not fire, if he has nothing to clothe himself with and nothing to eat, there is no war. Is therefore the soldier, the gunsmith, the shoemaker and the farmer guilty of complicity in the war? The argument is based on a confusion between guilt and causation. All these persons, and many others too, effectively co-operated in the waging of the war. But can one therefore attribute any guilt to them? Is Henry Ford partly responsible for the thousands of accidents which his cars cause every year? If an affirmative answer is given to the question of causation, the question of guilt is still not answered. The prosecution even refrain from putting this question.

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The question of guilt will be discussed later. Here only the following is anticipated: A guilty participation in the planning and carrying out of a war of aggression presupposes 2 things:

1.) That the culprit knew that this war was an illegal war of aggressior

2.) That, by reason of this knowledge, it was his duty to refrain from co-operating in it.

The latter links up with what has already been mentioned: by virtue of his position, it was Jodl's duty to make plans: Whether they were used or remained unused, did not depend on him. It is characteristic that Jodl made a whole series of deployment plans which were never carried out. All General Staff tasks are only drawn up for an eventuality in case the political leadership should "press the button". Often they did it, often they did not. That was no longer a matter for the General Staff Officer.

The other presupposition for an accusation of guilt is that the culprit recognises the war as a war of aggression. The question is, therefore, how these things appeared to him. How they were in reality interests the historian. The decisive question for the criminal lawyer is: What reports were submitted to Jodl about the conduct of the enemy? Could it be taken from the reports, that the enemy was acting contrary to his neutrality; that he was preparing an attack on us, etc.

The decisive point is not whether these reports were true but whether Jodl believed them to be true. I must stress this, because it has been said here at times: "the Court will decide whether this was a war of aggression." That, of course, is true, because if the Court decides that it was not a war of aggression, any sentencing for a war of aggression will fall out from the start. But if the court agrees that the war was, in fact, launched illegally, this does not in itself affirm the guilt of any person.

Someone who takes someone else's watch in the belief that it is his own is no thief. The guilt is lacking, for had it really been his own watch, he would not have been liable to punishment. So if Jodl believed that facts existed which, had they been true, would have made the war a legally admissibl one, a sentence for breach of the peace would not arise.

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Now, the Prosecution have repeatedly asked the Generals the ironical question how if conformed with the ethical code of an officer to assist in a war which they had recognized to be illegal.

Let us assume that Jodl was sure that the war was illegal and that he had, for reasons of conscience, refused to collaborate. What difference would there have been then between him and a soldier who throws away his rifle in battle and retreats? Both of them would be liable to the death penalty for disobeying orders in war.

I know that the United States are generous enough to respect a soldier who, for religious reasons, refuses to take up arms and not treat them as we do. But that, doubtless, does not apply to a man who, owing to objections based on international law, does not co-operate in the war decided on by the political leadership. One would object that it is not his affair, not an affair of his conscience, to examine the admissibility of the war, but that this is the duty of the responsible state authorities. According to continen al law, one would not even begin to consider such an excuse for refusing obedience.

Furthermore, I regard that ironical question to the Generals merely as an attempt to lower them morally but not as an accusation touching the subjec of these legal proceedings. The International Military Tribunal is not a court of honour which decides about the actions of the accused as they concern honour, but a criminal tribunal which has to judge certain actions which have been declared criminal by the Charter. It appears to me that the Prosecution forgot this fact on several occasions.

Before I pass on to the last point, the eleventh of the Anglo-American trial brief, regarding crimes against the laws of war and humanity, I must make a few preliminary remarks.

And I shall now leave out what is contained in paragraph one on page 70 and also the whole of page 71 and begin again at the top of page 72.

Again we must turn first to the question: wherein lay Jodl's responsibility as Chief of the Operational Staff of the Armed Forces?

As we know, Jodl was primarily the advisor of the Supreme Commander-in-

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Chief in the Operational leadership of the Armed Forces. This staff, however, had still other departments in addition to the Operational Departments of the three branches of the Armed Forces. When the operational tasks increased tremendously during the winter of 1941/1942, a division of work was arranged between the chief of the OKW and Jodl, according to which Hodl was only responsible for the military operations and the drawing up of the Armed Forces Report, while the Chief of the OKW worked on all other matters in connection with the Quartermaster Department and the organizational department of the Operational Staff of the Armed Forces. It follows from all this that Jodl had nothing to do with prisoners-of-war, for which a special department in the OKW was responsible, nor with the administration of the occupied territories, and therefore, nothing with the seizure of hostages and with deportations (I shall discuss UK 56 later.)

Nor did he have anything to do with police tasks in the zone of operations or in the rear military zone.

The Operational Staff of the Armed Forces had no authority to issue orders; nevertheless, there are many orders which Hodl signed either "by order" or with his own "J".

We must now roughtly discuss these orders and the responsibility for them?

1). There are orders which commence with the words "The fuehrer has ordered" and are signed by Jodl, or signed by Keitel and initialed by Jodl. These are orders which were given by the Fuehrer orally, with the order to Jodl to draft them or put them into writing. With regard to that responsibility, the same applies here fundamentally as for the orders signed by Hitler. For, in order to determine the responsibility, one must ask the question: What was the task of the person to whom the order was communicated? What was it his right and his duty to do?

When the contents of the order were fixed in all their essential points, Jodl's task was only a formal one: he had to word what was already established, to give it the usual shape of a military order, without being allowed to alter

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anything in its contents. It must not be overlooked that the criminality of an order can only lie in its contents and that it was precisely the contents which a subordinate had no influence on here. There the reason for the impunity of the subordinate does not lie in the order of his superior officer to act thus or thus, but in the lack of competence to alter anything in the given facts. If the Prosecution then sees in the formulating of the order criminal assistance, it is impossible to agree with this; in the first place, because it is an order of the Fuehrer's which creates law and in the case of which criminal assistance is impossible.

But even this is not accepted, and a Fuehrer's order is, on the contrary considered as contrary to law and as punishable, one can still not get over the fact that it was not Jodl's business to examine the legality, but only to draw up the Order technically correctly, i.e., in accordance with the will of the author of this order. If he did this and only this, he has no responsibility. Here the superior essentially gave the order himself, and the subordinate just put it into words.

I shall leave out the following [illegible] begin with the last but one line on that same page.

People actually want to make a difference between a clerk being given the job of writing down the order and a senior general.

The latter too will not have the legal, but perhaps he will have the moral duty of expressing his scruples to his superior. Jodl actually always did this; this was the least of his various methods of preventing an illegality, to which I shall refer later.

2.) Another very frequent case is where Jodl signed his order "I.A.", i.e. "Im Auftrag" (by order) or also initialled with his "J" orders signed by Keitel. Where does the responsibility lie here? We shall have to differentiate here between military and legal responsibility. From the military point of view, the superior, by whose order the order is signed, is responsible for it. Criminal law, however, lays the emphasis on the guilt, i.e. it wants to find the real culprit, not the person responsible from the military point of view. As, however, the owner of the initial or the person signing "by order"

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is mostly the author of the document, it may happen that the latter is responsible for purposes of criminal law, although he is not responsible in the military sense. For this reason it is necessary here to ascertain the actual share of both signatories in each case, and to determine the culpability accordingly.

3.) Where Jodl did not affix his initial on the right below the last word of the document, but on the top right hand corner of the first page, it means merely that the document was submitted to him for his information. It does not say whether he actually read it or approved it. Initials affixed in this manner do not, therefore, by themselves bring the initialer into any connection with the order for criminal purposes.

4.) Jodl is also being charged now with certain notes, partly so-called "memoranda", partly handwritten remarks which he wrote on drafts or other documents. What is the position with regard to the legal significance of such notes?

The following statement has already been made in the "Fall-Gruen" in connection with the tentative proposal to manufacture an incident. A memorandum contains the deliberations, statements of fact and opinions of the author or of other authorities etc. It is not an order but the data on the basis of which the superior can decide whether he will issue an order and what order. As long as such a memorandum remains a memorandum, it is a purely internal affair without any significance in international law and can never be a violation of the laws and customs of war, as was explicitly laid down as the presupposition for punishment in Article 6b of the Charter.

The same applies to the marginal comment which so often occurs in the files of the OKW: "Yes", "No", or "That is impossible" etc.

Admittedly, such memoranda or marginal comment may obtain legal significance. If a memorandum contains a proposal which is contrary to international law, and if it influences the superior in such a way that he

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issues an order with the same contents, thismight possibly be regarded as participation in a violation of international law. If, however, no order is issued, or if an order isissued which is contrary to the proposal, then this proposal has remained without effect, a purely internal matter, and unpunishable under all circumstances.

Furthermore, a memorandum or marginal comment may be a guide to the writer's sentiments. It may be gathered from it that he is inclined favourably towards international law or that he takes no account whatsoever of considerations of international law. That may often be an important help in judging his character.

But we do not punish the sentiments. Murderous intentions throw a bad light on the subject, but are not punishable. Caution must, of course, be exercised in the evaluation of such remarks. They are often thrown in thoughtlessly, without much deliberation, intended only for the reader in question, etc.

If we take all this into account, several of the accusations which the prosecutors have raised against Jodl, are eliminated in advance:

1. His behavious on the matter of the low-flying airmen-PS 731, PS 735. It has been proposed to leave low-flying airmen who attacked the civilpopulation in a truly criminal manner, as it happened again and again, to the lynchlaw of thepeople. Jodl was opposed to this proposal, as it was bound to lead to the mass murder of all airmen who parachuted down. Jodl raised objections and more objections in the form of marginal comments. He succeeded in sabotaging the order thereby. The Armed Forces never issued such an order. This should be placed to Jodl's credit, but it is apparently held against him that he did not use wordsof moral indignation in declining the proposal. Under the conditions existing at the time, such a cause would probably have had even the opposite effect. In any case there is no crime here.

2. The Commissar-Order -- PS 884. On this horrifying draft order which had been drawn up already prior to the outbreak of the Russian war, Jodl made the comment that it would provide reprisals against our soldiers, the order should preferably be drawn up in the form of a retaliatory measure; that is, one should wait and see what action the commissars really took, and

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then take counter measures perhaps. Again he is not given credit for the fact that he opposed it, but he is accused of how he opposed it. From a legal point of view that is meaningless. He did not even receive news regarding the success of his protests.

3. Geneva Convention - D-606. In this case Jodl did not only submit a memorandum but also a statement in great detail to Hitler, as he wished under all circumstances to cross the latter's plan of renouncing the convention. There he mentions all the reasons against the renunciation, and reassures Hitler afterwards by saying that it is possible to circumvent certain clauses even without a renunciation of the convention. This again is not an action contrary to international law, but shows at the most sentiments opposed to international law. More correctly, it appears to do so. In truth this was nothing but proven tactics for dissuading Hitler from his infamous plan. The renunciation did not take place. If one takes offense at the unethical argumentation, one over-looks the fact that Jodl, after five years' experience, knew better then we do with what arguments it was possible to persuade his chief.

4. Order regarding Leningrad - C-123.

By letter of the 7 October 1941, Jodl notified the Comander in Chief of the Army -- and it's nothing but a notification - that Hitler had repeated an already previously issued order to the effect that an offer of capitulation was not to be accepted from either Leningrad or Moscow. Such an offer was, however, never made, and the order could not therefore have been carried out at all. The whole matter remained on paper, and, if only for that reason, doesnot constitute a violation of international law. This also can at the most be regarded as a guide to the author's sentiments, but has no place on an indictment for the suspicion of a punishable action. The following should, however, be added in explanation of the matter; in this letter Jodl explained the indisputable situation of constraint which had caused Hitler to issue this order:

a) An offer of capitulation would only be simulated. Leningrad, in fact, was mined and would be defended to the last man, as the Russian wireless had already announced. The bad experiences as a result of the delayed action mines, prepared according to plan, in Kiev, Odessa, and Charkov, had

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taught the German Operational Staff what things they must beware of.

b) In addition there was the great danger of an epidemic which would exist also in case of a genuine capitulation. Even if for that reason alone, German troops must not be allowed to enter the town. Acceptance of a capitulation was thus not practical at all.

c) Added to that was the sheer impossibility of the German troops feeding a half-starved urban population of millions as well. The railway tracks had not as yet been altered to the width of the German tracks, and even the supplies for our own troops caused much worry. And finally there was the military danger for the German operations, of which Field Marshal Leeb had complained to the defendant Keitel.

All this compelled steps to be taken to prevent the population of the towns from fleeing westwards and southwards through the German lines, but to make escape to the East possible for them, indeed, even to encourage it. Hence the directive to leave gaps in the front in the East.

The fact that Hitler let it be understood how he intended to utilize the militarily technical situation of constraint within the framework of his Eastern plans lies outside the military considerations. It has nothing to do with the order itself. The only question is whether it was inevitable from a military point of view, and this it was in fact, for the above-mentioned reasons. Whether renewed notification of the order was given by Jodl or not could not alter the situation in any way.

I shall discuss now individual war crimes of which Jodl has been accused,

a) The Commando order.

Two orders of the 18 October 1942 which were drawn up word for word by Hitler and signed by him, have played a special part in this trial: the so-called commando order to the troops, PS 498, and the explanatory order connected therewith to the commanders, PS 503.

According to their substance these orders lie outside Jodl's sphere. If Jodl had anything to do with the matter at all, then it was for a special reason: the orders are executive directives to an order which had been issued by Hitler 14 days previously which had also been drawn up by him personally and attached to the Armed Forces Report of the 7 October 1942. Jodl composed this Armed Forces Report as usual, and therefore also the supplement regarding the previous history of the order which Hitler afterwards had added at the end of the Armed Forces Report. Hitler requested him therefore to work out drafts for the executive order. Jodl did not do so, nor did he submit a report which his staff had drawn up on their own initiative to Hitler. On the contrarym he had Hitler - with whom his relations were very strained at that time - informed that he was incapable of conforming to the request, Hitler then drew up the two orders himself.

Jodl is now accused of two things: He distributed the orders drawn up by Hitler through official channels, and he furnished the second, the explanatory order to the Commanders, with a special directive for secrecy.

The order arose from Hitler's excitement about two kinds of intensified warfare which made their appearance about the same time in the autumn of 1942. One was the fatal efficiency of excellently equipped sabotage detachments which landed by sea or were dropped from the air. The other one was a special running wild in the fighting methods of enemies who acted singly or in small groups.

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Jodle has described here how this running wild appeared from the messages and photographs of the troops. Experience showed that these methods, which violated all military ethics, were met with especially amongst the sabotage detachments. Hitler wished to counteract these unsoldierly methods, and to stop the sabotage activity which was so dangerous for the German prosecution of the war, but he knew, that sabotage cannot be objected to on grounds of international law if it is carried out by ordinary soldiers. Hitler's first and the one contained in the Armed Forces report of the 7 October 1942, is therefore quite simply explained: no mercy will be shown to enemy soldiers who [illegible] in sabotage detachments and behave "like bandits", i.e. who place themselves outside the military code by their method of fighting.

The executive directives should have defined the [illegible] of unsoldierly conduct; Hitler's executive directive did not contain this definition; in the decisive points it is not definate, and this made it possible to apply the order in the sense of its undoubtedly justified fundamental idea, and not to apply it

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where there were even doubts as to whether one had been dealing with "bandits."

After all the reports which had been received about the enemy's behaviour, Jodl considered the basic tendency of Hitler's directive in the Armed Forces report of the 7 October 1942understandable, and thought that the directives given by Hitler in the Commando Order of the 18 October 1942, which were in some points not clear, were in part admissible from the point of view of International Law and in part perhaps questionable from the same point of view. He says that he still knows no more exactly now than he did then whether and to what extent these directives were contrary to International Law. He says that one thing only was certain, namely that the indefinite wording of the order made it possible for the Commanders to apply the order only against people who had simply placed themselves outside the bounds of soldierly behaviour.

Jodl hoped that this method would be applied and as far as he could -- he permitted it, as is proved by evidence taken. He used all his powers to help ensure that the practical application of the Command order was restricted to what was undoubtedly admissible. He took steps to ensure, further, that the order was not applied in large areas, i.e. in the greater part of Italy, as soon as it was at all possible to wrest a local limitation from Hitler (PS 551).

The directive for secrecy is interpreted as a sign of Jodl's consciousness of guilt. But this secrecy had cogent reasons of a different nature. The enemy had to be prevented, as far as possible, from learning what serious damage their sabotage detachments which were operating in a bandit-like manner were causing. Hence the special directive for secrecy only in the order PS 503, which gives information about the damage, while the main order was known to the whole world through the Armed Forces Report. There was actually also a second reason for Jodl's imposition of special secrecy on the explanatory order. He did not wish to see the final decree, according to which captured Commando personnel were to be shot after interrogation, circulated. It revolted him as a human being to exclude unsoldierly fighters from the sphere of the Geneva Convention, whether such a course was admissible or otherwise according to international law.

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He hoped, and was justified in hoping, that the commanders would find ways of preventing inhumanities in individual cases by means of a healthy interpretation. And unauthorized persons were not to have knowledge of the decree.

The fundamental idea, which it was not indeed necessary to exceed in practice, conformed to international law, which is only intended to protect men who are fighting as soldiers. This is, after all, the tendency of all the articles of war, which presuppose a chivalrous battle. Something had indeed to be done to turn the use of such wild methods into a hazardous operation for the enemy. Nothing could be said against sabotage detachments who fought in a soldierly way. The enemy had only to desist from those methods which were in radical contradiction to international law.

Tge following must also be stressed: the transmission of this order does not prove responsibility for its contents. This is not like other cases where Jodl advised, or drew up the order. On the contrary, he refused to draw it up. He merely distributed it, as instructed, through the ordinary official channels. However, not because -- or better, not only because -- he was ordered to pass it on, but because he had no right to interfere with the order which was to be passed on, is he guiltless. It was outside his jurisdiction, outside his rights, to examine it. His activity was purely technical, independent of the contents of the document. In theory he was not even obliged to read it. Let us assume that, after drawing up the order, Hitler told some lieutenant to telephone it to the Commander-in-Chief. Would it then have been the lieutenant's right and duty also to examine the contents of the document with regard to its legal admissibility and to announce afterwards: "I will not do this", or "I shall have to consult the Hague convention for Land Warfare first to see if I am allowed to do it"? The most grotesque consequences would ensue! And in this case the Colonel General is also nothing but a messenger who passes on what has been handed to him. Jodl's answer to my question as to what would have happened if he had refused to pass it on, is characteristic of the military interpretation of the situation: "In that case I would have been removed immediately -- and rightly so! "

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GEN. RUDENKO: Mr. President, the defense counsel names as "bandits" a patriotic movement comprising millions of patriots fighting against German Fascist invaders. I consider that such an expression used by the lawyer should be considered as offensive against the partisans which participated largely in defeating the Hitlerite invaders, and I protest against it.

THE PRESIDENT: The object seems to be based upon some question of a Russian word which, of course, I don't understand. I understand that there is no objection to the English word "partisan." I don't know what the German word is. But there doesn't seem to be anything for the Tribunal to do about it

DR. EXNER: Mr. President, the point is still that hundreds of thousands and millions of patriots were among the so-called "bandits." I am using the word "bandits" because it was the expression used officially in official German orders. They speak about "partisan orders." We do not use the word "bandits" or "Partisanen" in any bad sense. It isn't an evaluation of the activities or the character of these partisans, and it isn't meant to be any type of judgment when I am using that word.

THE PRESIDENT: Is there a different German word for the English word "Bandit" and the English word "partisan"?

DR. EXNER: Yes. We, too, use the word "partisan", "Partisanen." For us that is a foreign word, but we also use it. And then we speak of "bandits", not necessarily in a bad sense. And then we speak of "Banditen," and these, of course, are criminals.

THE PRESIDENT: Why don't you confine yourself to the use of the word "partisan".?

DR. EXNER: I can certainly just as well use the word "partisan", "Partisanen." I have merely used "bandits" because we have the bandit order. That is the official expression which had been used, but I have no objection to using the word "partisan".

THE PRESIDENT: If you are quoting an order, you must quote the order in the words of the order, no doubt.

DR. EXNER: Very well. Then the partisan warfare.

As far as partisan warfare is concerned, reproaches could be levelled

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against Jodl only in two cases:

1.) If he had permitted the warfare to take place in a disorderly and "chaotic" manner, as one witness has asserted, or

2.) if he had issued battle directions, but if these had been contrary to international law.

But neither of the two is the case; Jodl was not personally responsible for this matter, but he had to take some interest in the partisan activity when it reached an extent which was beginning to interfere with the military operations. He issued a directive in 1942, a bandit order, which was replaced by a second one in 1944. It is therefore out of the question that no rules existed for the combatting of partisans.

Not can Jodl be reproached on the second point. Although Hitler wished to have a type of warfare waged against these dangerous opponents which had no consideration for ethics and internation law, Jodl -- without his knowledge -- issued a pamphlet about the combatting of partisans which cannot be attacked legally. He went as far as to have partisans in civilian clothing treated as prisoners of war, and to permit the burning down of villages to be carried out only on the orders of a divisional commander; this was intended to, and could prevent violations of Article 50 of the Hague Convention for Land Warfare (RF 665, Document book 11, Jo 44.).

Jodl cannot be reproached, however, if the combatting of partisans nevertheless degenerated badly. It is not a matter for the Chief of the Operational Staff of the Armed Forces to supervise the observance of his directions in four theatres of war.

c.) Burning down of houses in Norway (PS 754)

The prosecution have accused Jodl during cross-examination of having ordered the destruction of Norwegian villages. This accusation refers to the teleprint of 28-10-1944 to the High Command of the 20th Mountain Army.

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The Prosecution have a false idea of the role which fell to Jodl's lot he

The military position was then as follows: the Germans were retreating to the not yet completed Lyngen line. And there was a danger thatthe Red Army would continue to follow up during the winter and would destroy the much weaker German units, if, whilst advancing along the Reich road #50, the only one that could be used at this time of the year, they found the homes and the population with their local knowledge available. Without these billets and the support from the population., the Russian advance was impossible. The evacuation of the population and the destruction of the houses would exercise the danger and, over and above this, it would make partisan warfare against the German troops impossible. But the evacuation of the population was also necessary in the interests of the population itself.

In this position, Hitler issued, not on the advice of the soldiers but on that of the Reich Commissar for the occupied Norwegian territories--the decree which Jodl reported, by order, to the High Command of the 20th Mountain Army through the proper channels with all Hitler's military and ethical considerati One can really hear Hitler's radical way of speaking.

Jodl, who knew, as a result of a telephone conversation with the staff of General Rendulic, that the mountain troops did not need such a far-reaching order military and therefore did not want it, was against this order and-- whe he could not prevent it--sought for a solution which in practice led to the correct result. He wanted the order to be carried out by the troops only in so far as was absolutely essential military and in accordance with what was permissable under the Hague Convention for Land Warfare (Art. 23 g). He knew that his brother who was in command in the North, thought exactly like him; he knew the soldierly spirit of the mountain troops in general, and he knew in this particular case in advance that this order went too far for the troops So that it should be understood correctly by everyone right from the start, in the introduction to the teleprint he not only explained clearly that it was a "Fuehrer order"--the second paragraph expressly uses these words--but he let the soldiers know that the Fuehrer had issued this order on the suggestion of the Reich Commissar, and not on the suggestion of the military. Then they know, and they acted accordingly. No military unjustified demolitions occurred. Thus, among others, the 3 towns of Kirkenes, Hammerfest and Alta were not destroyed.

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According to the literal application of the order, they had to be destroyed.

d.) Deportation of the Jews from Denmark (UK 56):

The Prosecution wants to make Jodl responsible for the deportation of the Jews from Denmark. The Prosecution bases this accusation on a teleprint which Jodl sent "by order" (I.A.) to the Commander of the German troops in Denmark. It is particularly difficult to understand this accusation by the Prosecution; for the different documents submitted by the Prosecution unequivocally prove that the deportation of the Jews from Denmark was decided upon by Hitler on a suggestion from Dr. Best, therefore on a suggestion from the civil authorities and against the objections of the Commander of the German troops, and that this task was assigned to the Reichsfuehrer SS. The OKW was concerned with the whole affair only because at that time the military state of emergency existed in Denmark, so that the Commander of the German troops, as the highest executive authority in the country, had to be informed by his superior authority of the action ordered by Hitler and assigned to Himmler, in order to prevent friction between the German authorities in Denmark.

On the 20 September 1943 Keitel and Jodl had received the first intimation of the discussions between Hitler, the Foreign Office and Himmler, in a teleprint from the German commander. Jodl had only one wish -- to keep the Armed Forces out of this affair. His temperamental remark on General von Hanneken's teleprint of the 3 October 1943 (D 647)--"also a matter of complete indifference to us" (namely: whether the Reichsfuehrer SS publishes the figure of the Jews arrested or not) --shows only too well this has nothing at all to do with ethical considerations, either positively or negatively.

The whole thing had nothing to do with the armed forces. But difficulties could arise as a result of Himmler's action, as the armed forces were after all responsible for quiet and order in Denmark. The armed forces could not alter the decision taken by Hitler in this police matter, and could not have altered it even if they had been competent for this question.

Jodl simply informed the Commander, by the teleprint UK 56, of the decision Hitler had taken in the field of the police. And the Reichsfuehrer SS, the Foreign Office, and the Commander-in-Chief of the Reserve Army were simultaneously informed by Jodl that he had let the Commander in Denmark know, Now there was a clear line, and friction between German offices was excluded. And the OKW had only to see to this.

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One cannot say that the information which Jodl gave made the execution of the order, which Hitler had decided on apart from the Wehrmacht, easier. It is clear to anyone who knows even a little about Hitler's position of power that friction between German offices would in no way have prevented the thing being carried out, but would it must only have delayed it, and would certainly not have made it pleasanter for the persons affected.

Your Honours, it is an old saying of criminal law, a saying which I always find cited in foreign decisions too, that "actus no. facit reum nisi mens sit rea". Two things go to make a crime; the "actus", the objective side of the crime, the deed, and the "mens rea", the subjective side, the guilt.

The prosecution has fallen into a remarkable contradiction there; in some cases it stresses the "mens rea" and fails to see that the criminal "actus" is lacking: I have shown this in the case of the above-mentioned marginal comments, which do not represent any illegal actions, but at most could allow one to infer an illegal frame of mind. In other cases the prosecution looks only at the "actus", but does not ask whether a "mens rea" is also present. This second mistake is more dangerous, as here the outside of the crime is visible to everyone and it is often only a delicate psychological examination that comes to the conclusion that there is no "mens rea" which corresponds to the "actus". We will come to speak of this further on.

As regard the action, what is meant is behavior declared criminal by the Charter. This behavior can consist of positive action or of omission. If a father sees his child drowning while bathing and does nothing to save it although he could have done so, we declare him guilty either of murder or of killing by negligence, according to the degree of his guilt. This commission of a crime by omission is important in this trial too, for the Prosecution repeatedly stresses that Jodl was present at this or that meeting, at this or that speech. On one single page of the Anglo-American trial brief the sentence "Jodl was present at" occurs 6 times. What

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does this mean legally? Being present at and listening to things can be of great importance for the evaluation of a later deed, for the doer cannot excuse himself by saying "I didn't know" if he participated in the discussion of a plan. But mere presence does not in itself make one co-guilty. According to British law, even presence actually when a crime is committed makes one co-guilty only if encouragement is added. The same applies in German law. But where such does not come into the question, to lay stress on a person's presence when a criminal intention was discussed can only be a reproach that he knew about and tolerated it.

We often hear this reproach of having tolerated crimes now. Not only in this court. The whole German people are reproached with having tolerated a criminal regime and the annihilation of millions of Jews, Undoubtedly a crime can also be committed by tolerating things. But to make it a serious criminal indictment, e.g. one for intentional killing, two prerequisites must be fulfilled: 1) the subjective side, he must have known that the victim would meet his death if he did not intervene; 2) he must have been, in duty bound, and able, to prevent this death.

Mr. President, would this not be a convenient time to adjourn?

THE PRESIDENT: Yes.

(A recess was taken until 1400 hours.)

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AFTERNOON SESSION

(The Tribunal reconvened at 1400 hours.)

THE MARSHAL: May it please the Tribunal, the defendant Hess is absent.

DR. EXNER: We were dealing with crimes committed because such crimes were tolerated. As far as Jodl is concerned, the following applies: What an officer or official is legally bound to do or prevent depends on the regulations governing competence, and we know how strictly Hitler insisted on their being adhered to, how sharply he managed to divide up the political and military leadership and the military and the SS in their spheres of tasks. This was indeed the reason why Jodl took every opportunity to oppose the plan for extending the SS, for one thing was clear: once something had become the sphere of the SS, the armed forces had lost the right to have any say in it. It does not therefore mean much, for instance, that Jodl was present at a discussion between Hitler and Dr. Best, at which one of the things discussed was terrorism in Denmark and the way to fight it (RF 90). The mention of so-called "counter-murders", if such were really discussed, was not heard by Jodl (he was not present at parts of the session). His presence at this session does not mean much if only because the whole matter concerned occupied territory and did not concern the chief of the Operational Staff of the armed forces, who was brought into this meeting because of other things which were discussed at it. So even if Jodl had heard more drastic things at that time than he actually did, any interference would have been out of the question and would have been rejected at once.

The reproach of having tolerated things also assumes that the possibilit existed of preventing the crime. In the case of Jodl, only orders by the Fuehrer come into the question primarily; these orders he should -- as peopl say -- have prevented. But enough has already been said here about how thi stood with regard to influence on Hitler's decisions. As long as his decision had not yet been made, arguments could, under favourable circumstances, still impress him; but once his decision was made, it was irreversible. Any contrary opinion is simply based on ignorance of the fac In course of time Jodl did actually develop other methods for influencing

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decisions of the Fuehrer, or at least for influencing their practical effects. He used delaying tactics; either he waited so as to let the matter be forgotten if possible, or else he made difficulties and raised objections, the type of counter-arguments having actually to be adapted to Hitler's way of thinking -- the order regarding Commissars is a case in point -- or he sent for opinions from various departments in order to gain time. This is the case of low-flying airmen. If the order had to be published, he often inserted into it on whose application the order had been issued, in order to show the Commanders in Chief that he did not identify himself with this matter such as in the case of the Norwegian villages. Or he tried to influence the practical application by not objection to behaviour contrary to the order, such as in the case of the Commando order, etc. But if one thinks that he could simply have refused to draft an unethical order, one has only to look at the Commando order, where this method had exactly the opposite effect to what was intended.

I now come to the second part of the Latin saying I quoted: "The deed itself is no crime, "nisi sit mens rea".

This is the last point in my statement and is at the same time the most difficult and the most important in a modern criminal trial.

"No guilt, no punishment": this principle has been accepted in all civilized states since the Renaissance, even though different views as to the nature of guilt may exist in some places.

Allow me first to make a short comparison between the Anglo-American legal view and that of the Continent, e.g. of Germany. It is important when judging some cases.

I have already had to touch on an important point of the question of guilt when discussing the aggressive wars. If one wishes to make Jodl, the General Staff Officer, responsible for waging these wars at all, it is at any rate of decisive importance how he viewed the whole state of affairs. If he believed on the basis of the reports he received, that facts existed which -- if they were true -- justified the waging of war, Jodl can not be reproached with having knowingly waged a wrongful war. This applies even if his assumption rested on mistakes. Such mistakes exclude design. In a decision, Regina v. Tolson, [illegible]

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is stated: "at common law a reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted a innocent act has always been held to be a good defense". In another decision Regina v. Prince it is stated: It seems to me to follow that the maxim as to "mens rea" applies whenever the facts which are present to the prisoner's min and which he has reasonable ground to believe, and does believe to be the fac would, if true, make his acts no criminal offence at all." In a third case, Commonwealth v. Pressby in an American sentence, a good example is given: a sentry shoots at his commanding officer who is approaching him, in the belief that he is an enemy. This last example is closely related to the wars of aggression which are to be judged here.

As a rule, ignorance of criminal law is no excuse under British law.

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However, one finds the noteworthy principle: "If, however, there is a doubt as to a question of law, a person cannot be convicted and subjected to imprisonment if he has merely acted on a mistaken view as to the law." Naturally a mistake about preliminary questions in civil law can also exclude criminal intention: "If a person takes what he believes to be his own, it is impossible to say that he is guilty of felony." This rule could also be significant in our field too for mistakes regarding the regulations of International Law.

Yet in this doctrine of mistakes I see a certain difference from German law for in German law any mistake, even if resulting from negligence, excludes intention. In British law this seems to apply only to "reasonable" mistakes "unaccompanied by negligence." If that sentry had shot too soon without sufficient investigation, he would, under German law indisputably only have to be sentenced for killing by negligence. In England and America, if I understand it correctly, this careless mistake would not be taken into consideration at all, and this soldier would have to expect a sentence of intentional killing. But this difference in the conceptions of law should not play any part in our case. For one can hardly reproach Jodl with having come to his conception of the situatuation on the basis of a hurried and careless examination of his reports.

I do not wish to read the following in order to save time, and I wish to omit paragraph one on page 110. Starting with the second paragraph, I shall continue.

Lastly, in a third point which is of importance here, the views again agree. Every serious crime must be deliberate, thorugh, for deliberatness, one need not have the consciousness of doing something criminal, but one must be aware that it is not right to act in this manner. To constitute a criminal act there must, as a general rule, be acriminal intent. The general doctrine is stated in Hales Pleas of the Crown, that "where there is no will to commit an offense, there can be notransgression."

In German law, it has been argued for a long time whether the perpetrator must know that he is acting in direct contraventi on of the law, or whether it is sufficient for him to know that he is in general committing something contrary to his duty. And the prevailing opinion which has also been taken

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over by the plan of our German Criminal Code states: "The perpetrator must be conscious of acting against the law, or of acting wrongly in some other way, in a natural sense." I was greatly interested to find the same idea, expressed in almost the same words, in a British decision of Green v. Tolson "it must at least be theintention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may coexist with respect to some deed," Thus, according to British law, knowledg of not being allowed to act thus is one of the constitutents of intent: "There is a presumption that 'men's rea', an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offense." This decision quotes some exceptions to this principle, which do not interest us here. They concern Bigamy and seduction, where positive definition of the statute intervene, as well as certain offenses against public order, etc.

Our question now is: Was Jodl aware of wrongdoing during the preparation and passing on of the various plans and orders of which he is accused of today? According to my innermost conviction: No.

The only evidence of it, which the prosecution has produced is the question: why if he had a clear conscience was he in some cases so intent on observing strict secrecy? There is an answer to this: in military questions there are the most manifold reasons for not allowing certain things to become known. This was so before the war and all the more so during the war, and even now, after the war, deep secrecy shrouds the atom bomb to quote an example. This kind of obsdrvance of secrecy need not be connected with a guilty conscience. And if Jodl says he had arranged that one of the two Commando orders should -- irrespective of other reasons - bekept secret because of its repulsive final regulation, he did so, presumably, for the sake of the honour of the German Wehrmacht, and truly not because he thought that he himself was doing something wrong by passing on the order, an order which he had after all not drafted himself and for which, as he was convinced, he was not responsible.

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This last fact must be stressed. It is of general importance. In all Jodl's military preparatory work, whether he was making plans for wars, or drafts of decrees or memoranda, the point is not only whether he knew or suspected that this war or that decree were contrary to law, but it is decisive whether he knew that by his co-operation, by his actions he was doing something wrong. That Jodl did not have a bad conscience clearly follows; it seems to me, from the fact that before his capture, he had 3 weeks time in which to burn most of these documents, but did not do so, because he was quite convinced that he had nothing to conceal.

When drawing up this order, he was not conscious of wrong-doing. He could not be if only for two reasons: partly because he felt himself bound by the Fuehrer's orders, partly because - regardless of any concrete order - he was convinced that in his position as Chief of the Operational Staff of the Armed Forces he was in duty bound to act in this way.

Let us look into this more closely:
About the order and its legal meaning I will not speak any further. One point, however, appears to me to be in need of elucidation. Mr. Jackson quoted paragraph 47 of the German Military Penal Code to prove that, according to German law, an order by a superior officer does not excuse the subordinate.

Incidentally, it is remarkable that, in the case of the conspiracy, British-American law is used, whereas, in the case of this order, German law is drawn on -- in each case according to which ever is the less favourable to the defendant. I do not know, however, whether Mr. Jackson would have referred to para. 47 of the Military Penal Code, if had he known how it was interpreted by the Supreme Military Courts, and what was therefore the real legal position in Germany.

It is first of all necessary to establish that at the beginning of par 47 there stands the principle: "Should, by the execution of an order on official business a criminal law be infringed, the superior officer issuing the order is alone responsible." And now comes the exception which practice has cut down to the absolute minimum for the sake of maintaining military discipline. It is based on the point of view that a subordinate is subject

to punishment as a participant only if the order was not binding on him because, for instance, owing to its nature it did not come within the frame-work of Wehrmacht tasks and, if the subordinate was aware that the action ordered had a crime or an offense as its aim, the offense must thus be directly intended by the person issuing the order and the subordinate must be certain of this. That he could and should have realized this is not afficient. And, even if the subordinate is responsible, in case of slight guilt punishment may be waived.

The whole definition is very much contested, but one can see how the courts, havelimited its validity, in order to cover the obedient soldier as much as possible. Actually, a punishment of cases in this kind occurred very rarely. Jodl does not remember a single case in his 30 years of service.

I must insert something here, since a few days ago Mr. Jackson presented a document subsequantly, which concerns this problem (PS-3881). These are statements which Dr. Freisler, made as President of the People's Court, during the trial of those who took part in the attempt of the 20 July 1944. Freisler was always considered in Germany as a caricature of the judge. His unworthy shouts in that murder trial were produced here before us by the prosecutors a few months ago in a sound film. This legal expert, so far as thesense of his remakrs, torn from the general context, is recognizable meant: When an officer ordered a subordinate to give assistance in murdering Hitler, this order did not justify the one who obeyed.

In order to establish this, Freisler's "authority" was not required in any case. If ever a military order was issued which went outside the competence of the Wehrmacht and was therefore not binding, and did not therefore serve as an excuse, it was the order to murder the head of this very Wehrmacht. But how an order by some officer or other to murder the head of the State can be compared with the order of the Head of the State to commit an act contrary to international law, is incomprehansible, to me.

I am nt, however, dwelling further on this idea. No understanding of Jodl's position can be achieved and no correct judgement of his actions formed, if we do not look at the two men who faced eahh other here.

The prosecution have made it easy for themselves. Were Hitler still alive, he, as the head of the major war criminals would sit in the first place

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on the defendant's bench and would be considered as the base and source of all terrible events. Now that he is dead, his person is minimised when judging the other defendants,

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and their conduct is treated almost as if he had never existed at all. This man of force, this infernal power, as Jodl called him, cannot be passed over as a negligeable quantity when the question is to do justice to the commissions and omissions of his immediate entourage. During these months, I have again and again had to think of the connection between genius, madness and crime which was once shown by the perspicacious Cesaer Lombroso. In history it is success that has the last word on the worth and worthlessness of men. That is why the judgment of history on Hitler will perhaps be a crushing one. But one must not forget his beginnings when Germany's position at about the end of 1932 is compared with that at the end of 1938, one is not surprised at the incomparable prestige which he had at the very time when Jodl came into close contact with him.

Jodl now stood opposite this man. Jodl, an honest soldier, extraordinarily gifted, but never striving for anything else but to be a conscientious soldier, with a prosaically realistic mind, ill-disposed towards all diplomacy, all political machinations, grown up in accordance with the ideals of the German officer corps bravery, faithfulness, obedience - trained according to the 100 year old tradition of the German General Staff, which know only fulfilment of duty, selfless work and more work.

That this man, who was working at Adolf Hitler's side, was bound to come under his influence is self - evident. One must consider - the time at which this took place. A relation of confidence could not grow out of it, of course, but Jodl was also not the man to submit without opposition. There were enough clashe and explosions. Jodl was regarded as the man who dared to oppose the Fuehrer more than anybody else. He could, as Kesselring reported, oppose him with a sharpness which at times reached the limits of what is militarily permissible.

For this very reason I do not believe that it is order and obedience which can make us appreciate fully Jodl's behaviour during these years.

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It was rather the much more comprehensive thought of the fulfilment of duty: complete devotion to what had been allotted to him as his task at a critical time. One should realize and appreciate the situation in which Jodl found himself. His country battle for existence, the demands of the war which was continually becoming more horrible, and at the same time the view of his Supreme Commander-in-Chief which deviated from all tradition - about what was permissible and not permissible in a war. It becomes quite clear that Jodl was bound to come into conflicts, into conflicts with Hitler and into conflicts with himself.

Permit me to make a comparison: You, Your Honours, feel yourselves bound by the Charter of this Tribunal, as you have already informed ut. Perhaps some of you have been assailed by doubts as to whether all the conditions of this Charter conform to the international law at present valid and to the generally recognized legal principles. But you have rejected such doubts, since you, as judges, consider yourselves bound by the rules which your four governments have agreed upon.

Jodl in his capacity as a General Staff officer, may have felt himself bound, in a similar way, to assist in the orders of his supreme Commander-in-Chief even if doubts regarding their admissibility in international law may have assailed him here and there. But he considered himself bound by his office to draw up plans for war without examining whether and under what conditions they were carried out; he had to formulate and issue thousands of orders, even if he disagreed on some of them. Where neither remonstrances nor delaying tactics had any effect, he had to submit. As a General Staff Officer he had a purely assistant function. That he might be doing wrong while fulfilling this function according to the best of his knowledge and conscience never even occurre to him.

It is said now: Jodl should not have taken any part in this or that affair under any circumstances. What should he have done? If one reproaches somebody with having acted in a certain way

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that one must be in a position to state what action would have been right in that situation.

It is declared that he should have resigned.

This would of course have been an easy way out. It could be taken in peace time, but in war time it was quite different.

Jodl tried repeatedly to get out of the OKW and to get posted to the front but in vain. Applications for resignation were altogether futile unless they were desired by the Fuehrer, as in the case of v. Brauchitsch and v. Loeb. In war time, he strictly forbade his generals to apply to resign. That was desertion, he said. The private in the front line could not resign when he found things were unpleasant. The general also had to remain at the post where he was put. In 1944 this order was repeated in writing with all possible emphasis and reasons were given. If a general wanted to quit for reasons of conscience, he was to know that the Fuehrer himself bore full and sole responsibility for his orders and that the generals' sole duty was to be responsible for their strict execution. Resignations on such grounds were not soldierlike and were criminal. Therefore, Jodl could not resign.

Should he perhaps have faked an illness? This also is desertion and, in wartime, a crime punishable by death. Is it possible seriously to expect an officer brought up in the good old traditions to betray his country in time of need like a coward - his country, to which he had devoted all his life, the effect of which would be that he would no longer be able to look any new recruit in the face. I do not believe so.

There was therefore only the third solution: Murder and revolution. In peace time this would at the same time have meant civil war, in wartime the immediate collapse of the front and the end of the Reich. Was he then supposed to cry: "Fiat Justia percat patr

Really the prosecution seems to be of the opinion that such an attitude was to be demanded from the defendants. An astonishing idea! Whether murder and treason can ever be justified ethically had better be left to moralists and theologians to dispute over.

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For lawyers, at any rate, something like that cannot be a subject for discussion. To be obliged on pain of punishment to murder the head of the State? And, what is more, as a soldier? And in war-time? People who commit such crimes have always been punished but to punish them for not doing so would be something new.

Naturally there are limits to legal obligations for the lawy too, but in dilemmas which offer only this kind of solution, the old saying applies: Ultra posse nemo obligatur.

Jodl was no rebel. His conscience told him: The Fatherland is a need. Everybody at his post: Jodl's place was at the head of the operational staff of the armed forces. He did not get this post voluntarily, he did not keep it voluntarily. It was a hard duty. He fulfilled the task which this post imposed on him according to the best of his ability and conscience - unto the bitte end.

Your Honours!

Allow me in conclusion to recall a personal reminiscence, which throws more light on Jodl's personality.

I made his acquaintance about 20 years ago in the house of his uncle, the philosopher Friedrich Jodl, in Vienna. There I had a conversation with him on education for a career as an officer. What the young captain said about it was of such moral earnestness and so far from anything that could be called militarism that I have always retained it in my memory. I had no more contact with him of any sort until last autumn when I received the surprising summons to defend him here. My first thought was: "This gallant soldier must be helped." But I doubted whether I should undertake this, since I am not a professional attorney. Still, when I met him in the court building for the first time, he said something to me which scattered all doubts: "Rest assured, professor", he said "if I felt a spark of guilt in me, I would not chose you as my defense counsel."

Your honours, I believe that a gentleman, and not a criminal speaks thus. I ask that the Colonel General Alfred Jodl be acquitte

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THE PRESIDENT: I call on Dr. Steinbauer for the defendant Seyss-Inquart.

DR. STEINBAUER: Mr. President, members of the Tribunal:

Nuernberg, the old august imperial city, which has given not only to the German nation but also to the world one of its most deeply significant painters, Albrecht Duerer, an unsurpassed sculptor, Veit Stoss, and the mastersinger Hans Sachs, has, on her ruins, become the stage for the greatest criminal trials which legal history knows. Nuernberg has seen within her walls not only the pomp of the old emperors, but the rallies of the NSDAP also took place there, year after year, as a part of that propaganda machine which understood how to put into motion millions of people by a gigantic, but also diabolical stage management, with flags and standards, drums and fanfares under the slogan of German equality of rights in order finally, in the extravagance of its aims, to lead a nation which has given humanity so much that is good and beautiful to the verge of ruin.

We have heard the indictment here which tries to prove in a comprehensive way that some men had conspired to conquer the peaceful world by the waging of wars of aggression. It was said that the waging of these wars not only violated the treaties which were supposed to prevent war, but furthermore the rules for a humane conduct of the war, and had also trodden under foot the basic rights of humanity in the most contemptible way. Justice Jackson's passionate opening speech will go down into the history of this world trial like the speech of a Cicero against the conspirator Catilina. We saw for months, how mountains of documents and a long chain of witnesses were supposed to confirm the Indictment, and, on the other hand, how the Defense as keeper and servant of the law was striving to help the Tribunal discover the truth. But in the gallery the representatives from all parts of the world were seated, and only too often the whole world held its breath, when there was a break in the dark fog banks and again and again made a glimpse into the depths of unsuspected crimes possible. But outside, before the gates of the Courthouse, stand the deeply moved German people, among whose former leaders the defendants after all belong. But regardless of how the trials will end, the Defense must be given credit for one thing, namely that, with regard to the question of the

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guilt of the German people, one will never again be able to talk about complicity or collective guilt, perhaps rather about collective disgrace, because they were German men, under whose leadership crimes of the most horrible kind were committed. The curtain now rises once more on the final act of this world tragedy, in order to lend an ear again to the Defense, and then to pronounce a sentence which must not only correspond to fundamental legal principles but also ensure that crimes, such as the Prosecution describes, will forever be avoided.

On 20 November 1945, at the beginning of the trial, the Presiding Judge stated that these trials are of great importance for millions of people in the whole world. For this reason, he said, everybody participating in them has the solemn responsibility of fulfilling his duty without fear and without favor for anybody, and according to the principles of law and justice.

This duty was often an almost too heavy a burden for the defense counsel, not because of the extent of the material for the trials, not because of the abundance of legal questions which often were of a completely new kind, but because things were revealed here which are so monstrous and abysmally degraded that a normal brain will not even believe the possibility of such happenings. In so saying, I am not thinking of the prepared human skin, of the pieces of soap made out of human fat which were shown to us; I am not thinking of the systematic way in which millions of innocent people were tormented, tortured, slain, hanged or gassed. No, I am thinking of the many touching individual pictures which have made the deepest impression on me personally and probably also on every else. Once more, I shall continue on page 4.

Auschwitz alone has devoured 3½ million people, men, women, and children. That is really the most terrible weapon of the Indictment, that the spirits of all these innocent victims stand beside the prosecutor, admonishing and demanding revenge. But I do not stand alone, either. The many innocent war victims on the German side, women and children who have fallen victim to the terror attacks which violated international law, in Freiburg, in Cologne, in Dresden, in Hamburg, Berlin, and Vienna, and in almost all other German cities, step to my side. My comrades from the Wehrmacht who, as honest and decent soldiers, have sacrificed their lives for the fatherland by the hundred thousand

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young and old, faithful to their oath of allegiance stand by my side.

But even if they did not exist, if the defendant were all alone before his Judges, then it is even more my sworn duty as lawyer to stand helpfully by his side and to be his shield and defense, and considering the abundance of the indicting material, to call to you, honorable judges: "Do not judge in wrath, but rather search, like our Austrian poet Wildgans who was a Judge himself, has written in the album of a young Judge: "It is the flower (Edelreis) which blooms under thorns."

Before I now consider the Indictment with its individual points, I should like to sketch a short picture of the personality of the defendant. Schiller' words in Wallenstein, the drama, apply to him, too: "Distorted by the hate and favor of the parties, his character portrait wavers in history."

The Indictment, in the trial brief, calls him a cunning, coldly calculating, political opportunist who had a mission before his eyes. It is more than obvious that he misused his position as Minister, in order to delive Austria to the conspirators by his double dealing. He has committed atrocitie in Poland and in the Netherlands, in cold blood, and has trampled upon the rights of small nations to religious and political freedom of thought, unconcerned by constitutional obligations.

George S. Messersmith judges similarly in 1760-PS when he says that Dr. Seyss-Inquart, with whom he himself had little personal contact (the defendant denies ever having met Messersmith) had been completely insincere towards his friend, Chancellor Schuschnigg, according to reliable information h (Messersmith) received. The statement that Schuschnigg and Seyss-Inquart were friendly is moreover incorrect. Messersmith had left Vienna in the spring of 1937. As all witnesses testify Dr. Schuschnigg had at that time only just become acquainted with Syess-Inquart. But Messersmith added literally, that there is only one thing which may be said in favor of Seyss-Inquart at that time, namely that he may have believed the German protestation which were made to him, namely that Austrian independence would be respected.

I shall turn to page 7.

His political program was the Anschluss idea and, considering his origin, this is also easy to explain. His immediate home is the old mining town of

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Iglau, a German language enclave in the Slavonic sea. At an early age he learned what a small-scale fight means between two nations facing each other in enmity. He was deeply moved to learn that time's storms last year also swept over his immediate home and that Iglau, which had been German for 800 years, will be so no more. Therefore, in judging the defendant, we should take account of the fact that it was the Germanic Borderlands that have at all times experienced the greatest national distress and felt more strongly and fervently the idea of the great German Fatherland than the nationals of the rest of the Reich, lulled into self-sufficiency born of self-confidence. Thus it is no accident that leading men in the Anschluss movement, whose names stand out in my Document Book, came from the Sudetenland. Doctor Otto Bauer, the late leader of the Socialists, comes from Reichenberg, and State President Dr. Karl Renner likewise comes from Untertannowitz in Moravia, that is from German Sudetenland.

Inasmuch as I did not meet the defendant again since the fall of 1938, until I met him here again in prison, I have asked one of his collaborators in Holland, who also enjoys the respect of the Dutch and who was no National-Socialist, and as Judge of the High Court, a position he held in former times, can be relied on, for an objective opinion on the personality of Dr. Seyss-Inquart. He writes:

In his work his clear keen thinking, and the systematic manner in which he fully applied his many-sided talents in carrying out his duties struck me at once."

I continue at the bottom of the page:

"It is the great tragedy of his life and work that in the person of Hitler and several persons among those who were his closest co-workers, elements crossed his path which were stronger than he. As an intellectual and a mentally cultivated person he became immediately suspect to the main persons in power in the Party bureaucracy surrounding Hitler, Bormann and in the SS administration Himmler, although he wore the golden bade of honor of the party and occupied a high honorary rank in the SS, he continued to be the young Party member who came from the ranks of the intellectuals and were always regarded with mustrust. For those elements, however, he was too 'soft'. Altogether,

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however, it was his hope that he might increasingly prevent independent sections in the Reich from trying to work their way into his sphere of action as he himself gradually won the Fuehrer's confidence to an ever greater extent. His relation to the Fuehrer was to become fateful to him, as I already mentioned.

"However, I am firmly convinced that in such manner he, as well as a great portion of our people, unwillingly, as they were, became a sacrifice, a willing tool of the demoniacal power of Hitler....."

This is the opinion of an upright German Judge.

The Prosecution bases the trial on the concept of conspiracy, in an endeavor thus to forge a ring around the defendants which is to combine them all in one common responsibility. My learned colleagues have already spoken of the concept conspiracy and its consequences in this trial. To repeat these statements would be to carry coals to Newcastle. But because this is the leading theme for the trial which has ascribed responsibility for the world-shattering events, above all to my client, I should like to submit to the Court a few additional ideas on that subject.

In going through the records of history, we often run across stories speaking of men who combined for the overthrow of a ruler who was disliked, or a system that was hated, and for them to seize power. All these cases were listed under the superficial, collective term "conspiracies". In the book he published in Paris, entitled "The Technique of the State Plot", Malaparte, an Italian, tried to describe the technical methods applied in conspiracies and revolutions, beginning with the time of Catilina down to Hitler and Mussolini. Even this survey of technique will be sufficient to show how unjustified it is to dub all these undertakings conspiracies, if it is intended to embrace within this term a definite concept such as known in penal law. In any case it is certainly not possible to simply classify all these things, in popular terminology briefly termed conspiracy, under the caption of conspiracy, according to the concept of the Prosecution. When Guy Fawkes and his comrades, at the time of James I, tried to blow up the English Parliament in the so-called "Gunpowder Plot", perhaps this was a real conspiracy. Up to now, the English nation on the 5th of November of every year, celebrates with fireworks and

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and bonfires and the burning of a straw dummy, the anniversary of the day which saw the happy prevention of the plot. It would be a mistake, however, to simply term any kind of cooperation for political purposes a conspiracy, because, and it is particularly important to repeat and stress this, thanks to the vagueness of colloquial usage, it became always possible again to use the word "conspiracy" in political fights in order to justify thereby, because of lack of adequate legal grounds, the process of defaming and destroying political opponents.

Now I shall turn to page 12.

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For the French prosecutor I should like to cite from the history of his country, France, of an evidently erroneously termed case of conspiracy. Louis XVI was accused of conspiring against the nation and was found guilty. Citizen Doseze, on 26 December 1792, in the first year of the Republic at the bar of the National Convention, served as his defense counsel. His pleading was probably one of the most moving legal pleadings ever delivered, a discourse in which the defense counsel directed himself at the same time against another foe of criminal justice, a foe for political reasons or because of political passion, namely against a violation of the legal principle nullen crimen et nulla poena sine lege. Undaunted and unafraid he expounded, among other things, the following: "Where there is no law which can serve as directive and where there is no judge to make the pronouncement, one should refrain from accepting the general will as a foundation. The general will cannot as such speak either about a man or about a fact. But if there is no law according to which one can judge then it is also not possible to render judgment, and then one also cannot think of conviction."

We still find today this principle of nullum crimen nulla poena sine lege firmly rooted in almost all law books. We find it in the German and in the Austrian penal code; we find it in Article 1 of the Dutbh penal law and we also find it in French law in Article 4 of the "code penal" which states: "Nulle contravention, nul delit, nul crime, ne peuvent etre punis de poines qui m'etaiantpas proncacesspar la loi avant qu'ils fussent commis."

The fact that this principle has not lost any of its significance even today while this trial is in process, but on the contrary kept its full meaning, results from that. I want to remind again the French prosecutor that the French constitution which was submitted to the National Assembly on 19 April 1946, establishes specifically as statute of human rights in Article 10:

"The law has no retroactive force. No one can be convicted and punished, except according to the law which has been promulgated and publicized before the deed which is to be punished. Every person accused is considered uneer reservation as innocent unless he is declared guilty. No one can be punished twice for the same deed."

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What is now human right for the French, must necessarily remain human right for the Germans.

When in theyear 1935, the idea of analogy found its way into German penal law, thisinnovation also found severe criticism in the circle of jurists outside of Germany. The second international congress for comparative jurisprudence held in the Hague in theyear 1937 formulated a resolution., against the analogy in penal law. In this resolution, the congress expresses itself in favor of the principle "nulla poena sine lege". See Voeux et Resolutions du Douxieme Congres International de Dtroit Compare, Le Haye, 4-11 Aout, publie par les soins de M. Elemer Balogh, p. 69.

From the above mentioned statements it follows that it is legally inadmissable to apply principles in this trial which lack a legal basis. Continental law does not know the concept of conspiracy, Austrian law, which could come into question as the national law for my client, doesnot know this concept either. There are at best very small similarities if we point out that the explosives law of 27 May 1885, Reichsgesetzblatt 134, article 5 already declares the contemplation of the execution of a crime with explosives as punishable. Article 174 Ic of the penal code makes theft a crime if the thief commits thievery as a member of a gang which has banded together for the common commitment of thievery. German law recognizes the responsibilty under the penal code for the act of another only as accomplice, instigator, and helper. Conditions in French law are similar, and articles 59, 60, 89 and article 265 of the "Code Penal" are pointed out briefly.

That this fact is not clear and at least dubious, is also admitted by the respected Russian teacher of international law, Professor A. N. Trainine in his book "La responsabilite penale des Hitleriens" (Publisher: La presse francaise et etrangere, O. Zeluck, Editeur, Paris, 1945). He states in page 13:

"The problems of internation penal law have unfortunately been studied very little. There is a lack of theoritical, clear definition of the fundamental concept 'International Crime' and a well-ordered system of this law remains still to be created."

According to the Prosecution, the aim or the means of the conspiracy are crimes against the peace, against the rules of war, and against humanity.

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Professor Jahrreiss has already spoken extensively extensively about the liability for punishment of individuals because of the violation of international peace, and has described and given due recognition to the status of non-German international jurisprudence. But since jurists of the German language have also concerned themselves with this question, I would like to take the liberty of an additional remark.

The well-known Austrian shholar of international law, Alfred von Verdross, has established in his book, "International law"

"According to prevailing opinion, subjects of an international legal crime can only be states as well as other legal corporations immediately subject to international law, but not individual persons ---"

After these short supplementary explanations of the legal bases of the trial, I turn to the Prosecution which accused my client of having participated in the seizureand taking of control in Austria as a conspirator, and of having committed war crimes and crimes against humanity in Poland and in the Netherlands.

Thus the first act takes place in Austria, and the second one in the Netherlands, and after a short interlude in Poland.

East of Berchtesgaden is the Obersalzberg at an altitude of 1,000 meters, Adolf Hitler stands at the window thinking and his gaze glides over the meadows and valleys to the snow-covered mountains which shine a purple red in the light of the evening sun. The country which is protected by these mountains is Austria, his homeland. It is a German land, free and independent and not subject to his will as the Reich, whose absolute Fuehrer he has become. When he wrote his life work in the fortress Landsberg, he wrote right there on the first page of his book: "German Austria must return into the great German fatherland." The shadows of night rise slowly from the depth of the valleys and his thoughts glide over the mountains to the old imperial city on the Danube which he loves and hates at the same time. It is the city of his joyless youth, filled with want and misery. In his book, "Mein Kampf" he compares this city with Munich and says about the latter: "Munich, a German city, what a difference from Vienna, I get sick when I think back to this racial Babylon." And still, this city remains the

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goal of his longing and he calls this same city in the March days of 1938 a pearl to which he will give the setting which its buauty deserves. And on his table lies a book: "The History of German Austria". Hitler read this book again and again: it is the history of his homeland, and we also want to leaf through it a little, as far as time permits. We read: "Austria was throughout many centuries one of the strongest pillars of German life. Its evolution, its rise, and its descent form a considerable part of German history. Austria was and is a piece of the German glory, and German suffering. Austria has received inestimable strength, from the old Reich, but she herself has performedmuch of greatness and value for the expansion of the entire German culture."

I shall pass on to page 19. "The old Roman Empire of the German nation was destroyed in 1806, in the clash of the two powers. The Reich died, but the Reich concept lived. At Leipzig, in 1813, Prussians and Austrians fought shoulder to shoulder under Schwarzenberg, Scharnhorst, Gneisenau, and Bluecher for the liberation from the yoke of the Corsican tyrant. On 11 January 1849, the deputies of all German states assembled at Frankfurt-on-Main for the constitutional assembly. The Austrian delegate Bergassessor Karl Wagner from Styria spoke at that time the memorable words: 'Leave an opening for us so that we can enter; we shall come, unfortunately, perhaps not all of us anymore, we, Austria's Germans shall come, how and when, who can tell? Who can read in the book of the future? But we shall come!'"

In the year previously, in Paul's Church, where the delegates of all German lands and states had met, thepoet Ludwig Uhland as delegate spoke the memorable words: "May it be that it will always beAustria's job to be a light for the East; it has a closer, higher job -- to be the artery in the heart of Germany."

But on the battle fields of Koeniggraetz in 1866, a community of a thousand years between Austria and Germany was destroyed and Austria was forced to leave the German federation. How unsatisfactory the solution of the German question by Bismarck's forced exclusion of Austria from theunion of German states was, was also recognized in the Reich, where Paul de Lagarde wrote in 1875:

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"But despite this, 1866 and the German Reich is an episode. Nikolsburg cannot separate what has been decided by geography and history to be together, if this being together will not be a union for a long time yet."

The common history of almost a thousand years, but above all the common language and origin, the same customs and the same mode of life, demand the closest community. But is it not a symbol of spiritual unity that just as the North-German poet Hebbel, also Beethoven and Brahms made Vienna with its sense for art the permanent city of their work? There is no German music without Austria. But Austria did not only make her proud contribution to the cultural life of the German people in the field of art, but also in the fields of science and technology.

THE PRESIDENT: I think we can acquaint ourselves with the history of Austria without having it read to us as a part of your argument. Up to now there has been nothing in your twenty pages but the history of Austria.

DR. STEINBAUER: Mr. President, I beg your pardon; I consider it essential to give the reasons and the motives which motivated my client, but I have, however, concluded this point, and I shall pass over to the facts. I shall omittwo pages, and I shall continue on page 23.

The massed common will of the two great persons of the Third Reich to take over Austria at the opportune moment, isthekey to the solution of the Anschluss question. For that, one does not require a conspiracy; whoever also participated were figures on the chess board of the two men, supers in the great theater of the world.

But let us return to Austria. I have already pointed out in the presentation of evidence that according to my opinion, three reasons led to the Anschluss, and I have also attempted to explain this by the documents submitted to which I refer herewith:

1. the economic want,
2. the disunity of the democratic parties resulting from this and
3. the attitude of the great powers towards Austria, especially during the critical days of March 1938.

Dr. Karl Renner, the federal president of the Republic of Austria who enjoys the confidence of the four occupying powers and on whom the entire Austrian people look with respect because he has steppedto thehelm of the

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ship of state for the second time in a period of serious emergency, has described the history of the Anschluss very appropriately in a memorandum in 1945:

"The political reason why the Anschluss idea got hold of almost all of Austria at the conclusion of the first World War lay in the repeated proclamations of the victorious powers, that the war was waged for the 'right of self-determination of the nations'."

But this political reason was not decisive for themasses. Austria is a mountainous country with much too little arable land, a country of an entirely one-sided economic structure, its capital itself shelters a third of the population, its industry nourished a large part of the latter only by working for its neighbours, receiving from them raw materials and bread. The sudden separation of the high agrarian parts of the previously uniformtariff territory of the Danube Monarchy, and themeasures of the successor states in 1918 introducing high protective tariffs deprived the country simultaneously of its food sources and its export territories. The fear of not being able to feed themselves and of not being able to find work at hom, the sudden limitation of labor market were the factors which made in 1918 the Anschluss appear as the only possible solution. One cannot talk about a national Chauvinism of the Austrian working class, so much the less so, as this class had its origin to a very high percentage in parents of non-German blood and who had hardly lost their ties with the homeland. The overwhelming competition of the Reich German and Czechoslovakian industry loomed menacingly before the workers of all professions in this small country, cut off from thesea and poor in raw materials, which was afraid not to be able to stand up against this competition. To understand first of all this economic situation means to understand the Anschluss movement and brings the realization how Hitler's boastful announcement that he had eliminated unemployment in the world had made such a deep impression on the Austrian working class that the desire to prevent the Anschluss was so weak within this working class at the beginning."

With the decision of 5 Sept. 1931, the Permanent International Court at the Hague declared the customs union between Germany and Austria incompatible with the Geneva protocol of 4 October 1922 by 8 votes against 7. This

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w as the last attempt of the governments to achieve a closer mutual state-le al relationship with the express accord of the victorious powers. It failed. Hasn't the conviction bound to arise in the minds of fanatical Anschluss partisans that this paramount national aim could only be achieved through their own initiative?

A year later the deficit of the Austrian Foreign Trade reached 613 Million Schillings. Dr. Dollfuss concluded on July 13 1932 a loan agreement in Lausanne under the condition that the Anschluss problem would be put off for another 10 years. The ratification took place during the session of the National Council on 30 August 1932 with 82 votes against 80. In the federal council, the Social Democrat Koerner, at present mayor of Vienna, had protested against this law in view of a closer community with Germany.

Hitler came to power the year after. The Social Democrats saw their party dissolved in the Reich, the trade unions crushed; they saw the Reichstag fire and the starting persecution of the Jews, and their leaders turned away from the Anschluss idea. The Catholic circles, who wanted to fortify the Catholic element in the Reich by the Anschluss also turned away because of the beginning of the persecutio n of the clergy in the Reich; and only the National Socialists alone, whose membership had increased ten times within a short time, were in favor of the Anschluss. As Dr. Dollfuss had eliminated the parliament and thereby the way to power by means of votes, the National Socialists, under the leadership of land inspector Habicht, aspired with all means to the power in the State. We come to the bloody events of the year 1934. Dr. Dollfuss is killed by the hands of assassins and his successor Dr. Schuschnigg attempts to restore the order in the deeply shaken state system. The Socialists, however, remain sulkily aloof because of the February events of the year 1934. Under the foreign political aspect, the situation changes, too, While Italy in the year 1934 still stood on Austria's side and while Mussolini had deployed his divisions on the Brenner menacingly against the Nort the Ethiopian adventure had forced Italy on Hitler's side. Austria is forced to follow the changed course and

concludes also the agreement of 11 July 1936, in order to improve the economic situation. Germany recognizes the independance of Austria in this agreement and ceases the economic war. The price for that, however, is a series of measu which give the National Socialists in Austria a new boost. In order to extend the small platform of his government and in order to bring about a real satisfaction, Chancellor Dr. Schuschnigg declares to invite also the so-called Nationals to cooperate. Among these men is also the defendant, who then becomes Austrian State Councillor in May 1937. The idea of the Auschluss constituted his political program as already mentioned above. He never tried to hide this fact. He also comes from the ranks of the National opposition, a factor which must not be overlooked. The Anschluss also brought him nearer to National Socialism and it seems immaterial to engage in long investigations, at what time he actually became a formal member of the Party. Among the documents confiscated at his arrest, there was in any case also his membership card with the number 7 million. It is known, however that in Austria the so-called old fighters w re given a membership number below 6,500,000. When the new State Councillor then paid his first visit at his assumption of office to the Fuehrer deputy Hess, the latter is very polite but cool and he regrets that Seyss-Inqua was not an old fighter. The task of Dr. Seyss-Inquart is to supervise the execution of the July agreement and to act as a meditator between the Austrian Government on one hand, the national circles on the other hand, and the Reich. This task has been a thorny and ungratifying one. The patriotic circles, namely could not forget the terror of the National Socialists, during the Dolfuss period. The National Socialists, whose leader was Captain Leopold by that time, were not satisfied with the methods of the national representative Seyss-Inquart with the Government. There are constantly differences of opinion between these two men, which go so far that Seyss-Inquart wants to give up his mission to bring about an agreement. I refer in this connection for the sake of brevity to documents 44(letter of State Secretary Keppler to General Bodenschatz), 45 (Goering's telgram to Keppler) and 46 (USA 704) of my document book. There occur continuous violations of the July agreement, and the Austrian Police find the "coup d'etat" plan, known as Tavs plan, which strives for a change of the Gover-ment by violence. Minister Guido Zernatt has declared the defendant had remained aloof of all these endeavoors. (Doc. 47 of my document book). Then came the

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coference of 12 February 1938 at the Obersalzberg. The course of this conferenc is well known. That the defendant discussed things on the evening before this conference not only with Zernatto, the representative and intimate friend of the Chancellor in the government, but also with the national leaders becomes understandable if one considers again and again the at all times openly declared role as mediator by the defendant. The latter had to know also the clair of the opposition, if at the conference of the two statesmen at Berchtesgaden a clarification of the differences of opinion was to be accomplished. The defendant cannot be charged with playing a double game within the framework of a conspiracy because the National Socialist Party tried to exploit the Knowledge of the situation to their profit, and that in sending out Muehlmann was quicker than the unsuspecting Chancellor Schuschnigg. There, too, it must be referred to Zernatto, who died in exile and who declares that he was under the certain impression, that Seyss-Inquart had not yet knowledge of the agreements concluded at the Obersalzberg. On the basis of this agreement Seyss-Inqu was appointed Minister of Interior and Security. He goes in that capacity to Berlin in order to pay a State visit to the chief of State of the German Reich and in order to present to him on that occasion his political program for the relationship of the two States, which is known from the File Notes(Exhibit No. submitted to the Tribunal. The testimony of the defendant as witness of this conference appears completely believable. Hitler had at that time obviously not yet decided to carry out the Anchluss. It must at this point be referred to the testimony of the defendant Goering, who testified the following on 14 March, when examined as a witness: "I was not present in Berchtesgaden; I did also not agree with this agreement, because I have always been against every fixation which again extends this state of suspension". Through the agreement of Berchtgaden the activity and propaganda of the Nazis in Austria had been permitted to a certain extent. The 2000 party members, released from prison on the basis of the amnesty and the members at least a part of whom had returned from the Reich, were especially active in the federal states to an increased extent, for a rapid increase of the Party and used Hitler's Reichstag speech of the 20 February particularly as a signal for hostile demonstrations against the State for the purpose of acceeding to governmental power in the shortest time. Not only Schuschnigg but the great mass of the working class now realized the dange

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ous character of the situation. The menacing peril cause part differences to be forgotten, and negotiations between Schuschnigg and the Socialist Labor Leaders and the Christian trade unions seemed to provide an insurance for the defeat of the imminent assault of Nazism, by the constitution of a common defensive front of all democratic forces. Prompt action was necessary and Schusnigg proclaimed his plebiscite. The whole country awoke from its lethargy. Workers and peasants were called up to defend their country and the electoral preparations carried out under the leadership of Zernatto, in the short time available, in the factories and in the very remotest mountain valleys. It was clear that this attempt of Chancellor Schuschnigg to swing the helm around and alter the course at the last moment could not fail to elicit the resistance not only of the National Socialists in Austria, but also of those in Germany. Hitler raved and Mussolini had unfortunately only too good a reason in warning Schuschnigg, before the election, with the hint that it would be a bomb which would explode in his own hand.

And now, let us turn back to the defendant. He was not only a Government member, he was the trustee of the national opposition and the guarantor for Berchtesgaden before the Reich.

If the Prosecution accuses him with having given Schuschnigg his word of honor with reference to the election and not having kept it, that is not correc Reference is made, I understand to the speech held by Gauleiter Rainer on 11 March 1942 before the Carinthian Party members. On Page 12 of this document, it is disclosed that Zernatto's lady secretary member of the NSDAP and betrayed the plebicite plans to her co-members as soon as she learned them. Rainer says we already know the whole plan at 11.30 p.m. that same evening.

THE PRESIDENT: The Tribunal will recess now.

(A recess was taken.)

DR. STEINBAUER: The protest formulated by Seyss-Inquart in the name of the Nationals to the Chancellor against the plebicite was indeed entirely justified juridically. Beside the fact that there could be no security at such short notice for a proper vote, the vote itself was not constitutionally legitimate Article 65 of the Austrian constitution of 1 May 1934 specifies exactly under what circumstances the nation can be called upon to vote. Dr. Schuschnigg, there fore, supports his proclomation of the election upon Art. 93 of the constitution

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which Article merely says generally: The Federal Chancellor sets down the directives of policy." The execution of the election was incumbent upon the National Front, i.e. the political organizations. The subsquent developments are well-known, particularly the events of 11 March 1938. In this respect, the main charge, that of conspiracy is, I take it, that Seyss-Inquart has induced the entry of the German troops by his telegram about alleged unrest. We come across this historical lie, which has brought the defendant the name of "Judas of Austria", in most

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relations of the Anschluss. We find it, for instance, in Raphael Lemkin's "Axis Rule in occupied Europe" (page 109). We find it again especially in the opening speech of the American Chief Prosecutor Jackson, although it is incontestably proved by the submittal of Goering's telephone conversations (2949-PS) in relation with Goering's testimony that this telegram was never sent and was dictated, what is more, to a third party, at a time when the German troops had already received the order to cross the frontier. Consequently, these telephone conversations by Goering represent a historical document of the greatest importance.

Rainer's Carinthian speech and his testimony as a witness before the Tribunal also contradict the prosecution as regards Seyss-Inquart's contribution to the seizure of power. According to this document, (4005-PS) it was Globotschnick who made an abusive use of the Federal Chancellery's telephone to alarm the Federal States. Appointed Federal Chancellor by virtue of Schuschnigg's withdrawal under duress, the defendant discusses the constitution of the cabinet, invites the ministers to assume their functions, and takes the retiring government chief home in his own car.

When it is further learned, from the testimony of witnesses Stuckart and Glaise-Horstenau, under what circumstances the law of annexation came into being, then it can indeed be said that Zernatto was right when he wrote that Austria was conquered, in his opinion, even against Seyss-Inquart and his government. I refer to Exhibit No. 63. Whoever, therefore, dispassionately surveys the whole set of events of March 1938 relative to the Anschluss, and examines particularly the part played by the defendant, can only come to the conclusion that one cannot really speak of a carefully elaborated "Conspiracy" of the minutely concentrated perpetration of a crime. Where Austria is concerned, however, the Englishman Geyde is right when he says the curtain fell on the "Tragedy of Austria" with the invasion by the troops. It was to rise again soon on a new play: "The Martydom of Austria.".

On 15 March 1938, Adolf Hitler came to Vienna. We have seen in this Courtroom the film record of his reception. With emotion, the defendant addressed him as follow: "That centuries of German History have striven for,

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for what untold millions of the best Germans have bled and died, the ultimate aim of ardent struggles, the ultimate solace of bitter hours, has materialized today. The 'Ostmark' is back with the homeland. The Reich has resuscitated, the German racial Empire is established." With this, Seyss-Inquart had defined the political aim which was, and remained, the guiding star of his actions.

With the Fuehrer came Joseph Goebbels, who switched his gigantic propaganda machine into full swing. Rallies were held in close succession. Festivals were celebrated. There was not a house in the whole country which was not beflagged. The leader of the socialist workers said: "I vote yes" and the Bishops made exhortations for the accomplishment of a national duty: "Render unto God what belongs to God and unto the Emperor what belongs to the Emperor". Both were to be mistaken. For with Goebbels came Himmler and his Gestapo and SS. Already, on the night of 12th March, began a large arrest operation in Vienna. It included the members of the former military associations as well as prominent leaders of the socialist syndicates, Jews who were active in political or public life, Communists and Monarchists, priests and Free-Masons, and even the leaders of the Boy Scouts and of the Austrian Youth organizations. In Vienna alone, 76,000 arrests were made. On 2 April 1938, the first Dachau convoy already set out from the West Station with 165 leading officials, including the present Federal Chancellor Figl, Education Minister Hurde and Minister of Justice Dr. Gross. The second convoy followed on 21 May, the third at the end of May, and so it went on. Punctually, every 8 days, convoys went off to Dachau, Buchenwald and Sachsenhausen. On May 10, 1946, the National Tribunal in Vienna sentenced to death Anton Brunner, who caused 49,000 people, mostly Jews, to be sent to the extermination camps in Theresienstadt, Auschwitz, Minsk and Riga.

And what of the defendant? He was given the cold shoulder and relegated to a corner. The victor of the Saar electoral contest, Joseph Buerckel, was instated as Reich Commissioner for the Reunion of Austria with the Reich, and armed with dictatorial power. The powers of the defendant scarcely exceeded those of a higher president in the Reich, i.e. those of an administrative

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authority on the intermediary level. Indeed, immediately above him was Buerckel who, under the pretext of the annexation, interfered with everything and alid claim to everything, particularly as regards matters concerning the Churches and Youth, as is evidenced by Documents 67, 70, and 91. The defendant himself opposed Buerckel's methods. Indeed, he raised objections to Hitler himself against Buerckel's action in Graz on 8 April 1938.

This we know also from the testimony of Neubacher, Schirach, and Stricker, and from the documents submitted by the defense. But Buerckel, whom Churchill described as the "Governor of Vienna" in his book "Step by Step", remained the stronger and the embarrassing censor. Seyss-Inquart was moved away to South Poland as a Provincial Commissioner. This treatment at the hands of his alleged fellow-conspirators shows only too clearly that Seyss-Inquart was actuated by his enthusiasm for the Anschluss and cannot have been a conspirator. He was not a leader, he was led, or, what in my opinion is more accurate, perversely led. He was even perhaps a docile tool in the hands of the big two, Hitler and Goering, but it was solely for his political ideals, the Anschluss, without any intention of a war of aggression.

Of course, there was something of an economic crisis in Austria after the Anschluss. It was partly a repercussion of the rearmament. But what took place was not the Anschluss as the Anschluss enthusiasts in Austria had visualized it, especially as the war provided a motive and a pretext to level down and repress every dissenting or critical opinion, to the most ruthless extent.

Austria did not cease to hope for her liberation and to fight for it. There was much distress and many died; 6,000 were executed in Austria. In the Vienna judicial district alone, 1200 men died by the guillotine, 800 of them just for their anti-Nazi opinion. In the last days of the war, Vienna's most beautiful edifices fell in ruins and St. Stephan's Cathedral, one of the most august monuments of German Gothic, went up in flames.

So, the promise that Hitler had made on 15 March 1938 was fulfilled: "The pearl has the setting, which her beauty deserves." The idea of union, that is to say the wish to bring about the national unification of a nation, was not a crime; criminal, however, was the introduction of a system that has

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presumably blocked its realisation forever. The defendant certainly did not wish that.

To conclude my statement regarding the Austrian question I shall now briefly proceed, from the point of view of the defendant Seyss-Inquart, to examine the question as to what there is to say against my client from the legal respect. For the clarification of his legal responsibility I will review his behavior in the following short review.

First in his political activity:

1.) After the agreement of 11 July 1936, the Federal Chancellor Dr. Schuschnigg took the defendant Seyss-Inquart as a representative of the national opposition as collaborator, thus not as a political follower as for example the witness Guido Schmidt.

2.) Seyss-Inquart has always declared -- for the first time to Dr. Dolfuss in July 1934 -- that the national opposition consisted only of National-Socialists who obey solely Hitler's will, in any case will never act against Hitler's will.

3.) Seyss-Inquart declared he was a National-Socialist; he thus always represented the interests of the Austrian National-Socialists. This is not confirmed alone by the witness Skubl but referred to by the authorities previously quoted by me.

4.) To avoid any military or international conflict Seyss-Inquart pursued the following aim: Participation, for theAustrian National-Socialists independently of the Reich National Socialist Party, with closest collaboration between Austria and Germany.

5.) Seyss-Inquart declared that this aim could only be attained if Hitler agreed to and directed the Austrian National Socialists expressly towards this policy.

6.) The culminating point was Seyss-Inquart's efforts during his interview with Hitler on 17 February 1938, although, so to say, Minister by the grace of Hitler, he represented his Austrian program.

Herein lies Seyss-Inquart's mistake. He thought Hitler and Berlin would establish a policy, i.e. as Bismarck said, exploit the art of possibility.

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Berlin, however, did not wish to establish a policy. In the face of this fact Seyss-Inquart's policy fell to pieces on 11 March. Is this mistake punishable, as, moreover, the Austrian State leaders desired an agreement on the same lines, and Dr. Schuschnigg, knowing his program, kept him employed? In view of the defendant's basic attitude until March 1938, details of his political tactical attitude are of secondary importance.

And now to the activity of the defendant as Minister of the Interior and as Security Minister.

7.) There is no trace to be found of any National-Socialist influence on the Austrian Executive. The witness Skubl confirmed this with unsurpassed clearness. Seyss-Inquart forbade the police to take any political position, (Document 51); he forbade National-Socialist demonstrations, (Document 59); he avoided such occasions (Document 59); he demanded legality of the Austrian Nazis (Document 52).

8.) On 11 March 1938 Seyss-Inquart fulfilled his duties as liaison officer in virtue of the Berchtesgaden agreement. With Glaise-Horstenau he gave Dr. Schuschnigg, in the forenoon of 11 March, a quite candid statement of the facts? He pointed out particularly threatening National-Socialist demonstrations, and the possibility of a German invasion. In the afternoon he delivered Goering's demands to Schuschnigg and the latter's answers to Goering.

9.) After Dr. Schuschnigg's offer to resign, Seyss-Inquart retired. He complied in no way with Goering's demand to obtain the transfer of the Federal Chancellorship or to seize power. The ultimatums, with the threats of invasion by the Reich, were, as is know, transmitted by Embassy Counsellor von Stein and General von Muff to whose pressure President Miklas finally yielded. This appears from President Miklas' statements (3697-PS) and from the witness Rainer and Schmidt.

10.) Only after Dr. Schuschnigg's farewell speech did Seyss-Inquart publicly demand the maintainance of order. He does not designate himself as a Provisional Government, but, in good faith, as Minister of the Interior and of Security, as was confirmed by the witness Schmidt. He took the order not to make any resistance to the German troops from Dr. Schuschnigg's farewell speech.

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11.) Seyss-Inquart tried as long as possible to preserve Austria's independence and that by telephone conversations with Goering, Doc. 58; for the reasons that he requested Guido Schmidt to join his Ministry as Foreign Minister, as confirmed by witness Schmidt:
according to the statements of witness Skubl;
by refusing the demanded telegram Doc. 58;
by the request to Hitler not to invade, as confirmed by Goering;
by the request to Hitler also to let Austrian troops march into the Reich.

12.) On 13.3.38 the Anschluss Law was proclaimed in conformity with Article III of the Austrian Constitution of 1.5.1934. The psychological situation of Syess-Inquart was the same as that of all Austrians, who, on April 10th, had by secret ballots voted Yes for the Anschluss, by 4,381,070 votes against some 15,000, No. Among other things Seyss-Inquart is reproached that:

Firstly he has used his various posts and his personal influence to promote the seizure, incorporation and control of Austria by Nazi conspirators.

Secondly that as an integral part of his evil intentions, within the meaning of the prosecution, he has taken part in the political plans and preparations of the Nazi conspiracots for wars of aggression and wars in violation of international treaties, agreements and assurances.

To 1. Concerning the first named accusation, I refer to above summary and can limit myself to the following short statements: As a political aim, the annexation of Austria to the German Reich is nowhere punishable, and the defendant had no other aim. The Prosecution oversteps here -- as also on other points -- the limits of the Charter.

To 2. Concerning the second accusation that co-defendant Seyss-Inquart has participated in a conspiracy against peace, this is to be gauged by Paragraph 6, Part 2 a of the Charter. It is said there, among other things, that planning in common, preparation or execution of war of aggression or war by the violation of international treaties, is punishable as a breach of peace.

I leave to the examination of the Tribunal if the case of the invasion of Austria really comes under the application of this provision in spite of the fact that therewas no war. Much can be said in favor of the fact that the

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outbreak of a war is the proviso for culpability for breach of the peace within meaning of the said provision.

In any case I cannot reconcile myself to an interpretation of this provision which goes so unreasonably far as even to consider an abandoned war plan or the possible planning of an eventually bloodless war as punishable as an accomplished crime.

It must be stressed upon with the greatest vigour that no proof has been produced therefore that my client has ever imagine that a war might arise between Austria and any other Power because of the Anschluss or as a result thereof. On the contrary, his decision to occupy himself actively with politics, after the drama of 25 July 1934, was dictated by the effort not to let the Anschluss question be the cause of international complications. On that point he must have been far from imagining that Hitler and his entourage h viewed such a consequence as possible. The consequences of the Austrian enterprise proved him right. The German troops were greeted on their march into Austria with flowers and cheers.

Concerning the Great Powers, France and England protested on March 12th 1938 against the Anschluss. But this was only a very mild and platonic protest. A military support of Schuschnigg did not result; in the first place the League of Nations which was the guarantor of Austria's independence, was not invoked.

On March 14th 1938 the British Government declared in Parliament that it had discussed the new situation with its friends of the Geneva Entente and that the unanimous opinion had been that a debate in Geneva would lead to no satisfactory result.

When the League of Nations was informed of the Anschluss by the German Foreign Office it took note thereof without protest, and the Austrian representative at the League of Nations, Pfluegl, received his passport. The Hague Arbitrative Court has struck its Austrian member, Professor Verdross of Vienna, from its register of judges. The diplomatic agencies were withdrawn or transformed into Consulates in the German Reich.

Only a very short time elapsed and already a few months after the occupation and annexation of this small country a State treaty concerning a

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second small State was concluded in Munich on September 29th, 1938 with the alleged aggressor.

The French Prosecutor de Menthon recalled in his indictment speech the memory of the great politician and statesman Politis. I also wish to call him to mind. Shortly before his untimely death he wrote in his book "La morale internationale" (International Ethics) the following: "Qui menace les petites nations menace l'humanite toute entiere!"

The Powers of the League of Nations did not feel compelled to pay any attention to this sentence.

But there is another principle of international order which they did not see fit to apply against the annexation of Austria.

I mean thereby that principle which, under the name of the Stimson doctrine has penetrated into the science of international law and diplomatic language. It is the principle according to which the nations of the world refuse to recognize forcibly obtained territorial acquisitions. This principle has at least penetrated [illegible] legal consciousness of present times as deeply as the prohibition of wars of aggression, which is one of the main pillars upon which the Nuernberg trials rest.

I am now going to leave our one page, and I shall continue on Page 44.

And finally I recall to the memory of the Court the

declaration of the Council of the League of Nations of February 16, 1932, in which the Stimson doctrine, devoted into a principle, found the following expression: "No trespassing into the territorial integrity and no infringement of the political independence of a member of the League of Nations committed against Article 10 of the Charter of the League of Nations could be recognized is legally valid by the member nations."

Nevertheless all thenations of the world have recognized the incorporation of Austria into Germany without being compelled to concern themselves with theStimson doctrine.

At the same time something essential can be said against theindictment for breach of the peace in violation of the treaties. Germany is supposed to have violated three treaties. First the German-Austrian agreement of July 11th, 1932, secondly, Article 88 of the Treaty of Saint-German, lastly, Article 80 of the Treaty of Versailles. Here also it must be pointed out that all the nations concerned have not only put up with the violations of treaties, but moreover sanctioned them tacitly by their atzitude. Herein lies atleast a renunciation of international law, and the Powers concerned have thereby deprived themselves of any right to an ulterior reaction because of treaty violations, which would be in contradiction to any fairness.

In regard particularly to Article 88 of the Treaty of Saint-Germain, a violation of this provision cannot to begin with be charged against the German Government and therefore against Seyss-Inquart as alleged co-conspirator, because Germany was not bound by this contract which she had not signed and which for her represented a "res inter alies acta".

On the other hand the German-Austrian Treaty of July 11, 1936 was a "res inter alies acta" for any other Power than Germany and Austria; here Austria alone could have raised the objection of breach of treaty. In this connection attention is called to the fact that the reconstituted Austria is not among the signatories of the London Agreement of August 8th 1945. Therefore the four founder States of the International Military Tribunal are not justified in vindicating Austrian interest at these trials.

In regard to Article 80 of the Treaty of Versailles, I resist to the temptation to discuss the question of the legal validity of this provision, in

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particular I will not raise the point of what significance the contradiction of this Article with the so-called 14 points of President Wilson may have from a legal point of view.

But at the conclusion of this, my legal explanatory statement of the Austrian affair, I cannot suppress a thought of general import:

One of the great principles of international order which, in the course of the 19th and 20th centuries, fought itself through amidst much trouble, much confusion and many makeshifts and realized its aims more and more, is the right of self-determination of nations.

This basic principle of the right of self-determination of nations has anchored itself into the legal conceptions of international relations of our century to such a great extent, that one is forcibly led to include it among the general principles of international law, a thought that particularly appeals to democratic ways of thinking. But as a general principle of international law, it would then become the standard criterion of judgment, besides the Charter, the customary international law and thirdly the treaty rights, for the Nurnberg International Military Tribunal, which at any rate must find a similar basis for other questions. And further it would become, like all other generally accepted principles of law, of imperative character and have precedence in particular over international treaty laws.

A number of States have to thank thislofty expression of democratic thought for their existence, Such grace has been denied the Austrians after the First World War. Despite the fact that the people in Austria as well as in Germany unanimously strove for union, Austria was forced to eke out an existence as an artificial, unnatural State structure, able neither to live nor to die. How bitter sound the words of the Encyclical "Ube arcano" of December 23, 1932; "We hoped for peace; but it did not bring salvation; we hoped for healing but terror came; we hoped for the hour of recovery; but only confusion came; we hoped for light, but only darkness came."

In the year 1938 also Austria and Germany strove for union, following in this the wish of the overwhelming majority of their citizens, and this time success came.

From the point of view of world history, the incorporation of Austria

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has no other significance than the successful integration of a mighty principle of international order, of the right of "self-determination of nations. This dynamism carried away artificial and unnatural treaty stipulations.

Who can speak here of guilt?

I have nothing to state on the question of Czechoslovakia and on the question of Poland very little. For during his short stay he was not in evidence at all to the Poles, but was mainly concerned with the organizational problems of the building up of the German administrative apparatus. In this matter it is sufficient for me to refer to the results of the handling of evidence.

Now will I say anthhing more about his honorary rank in the SS than that an honorary rank never stood under Himmler's commanding and disciplinary power, nor itself possessed such power in the SS. As regards his position as minister without portfolio, the importance of this function within the scope of the organizations will be discussed in the chapter "Reich Governme Therefore, without going more deeply into this interlude, I hasten to the second scene of this legal matter - the Netherlands.

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THE NETHERLANDS

Many know her only as the country of windmills, wooden shoes and wide breeches, with her red brick buildings, her large herds of cattle in green meadows and her immense varicolored tulip-fields. I know her as the country that gave to mankind a Rembrandt, the numerous masters of the Dutch School and de Grotius the great teacher of international law, that struggled for her liberty in gory fights against Philipp II of Spain and produced the great naval hero de Royter who won one of the most famous naval battles in history on 21 August 1673. However, in this trial here we learned that of all the occupied countries, the Netherlands offered the most united and thougest political as well as increasingly effective active resistance; we also learned that throughout these years these people never abandoned the hope that the moment of liberty would surely return some day.

The motto of the province of Zealand :"Luctor et emergo", "I struggle and do not go under " had become the rallying word of the whole country.

Seyss-Inquart came to this country in May 1940 as Supreme Chief of the civil administration. Whatever he may have thought and planned, it is tragedy that he came as the representative of Adolf Hitler and of a system hated the owrld over. Hundreds of laws, orders and decrees repeatedly bore his signature and though they may have been ever so fully correct legally, in the eyes of the people they still remained measures of the enemy, and Seyss-Inquart, their oppressor. My client did not force himself into this office. He had rather requested permission to go to the front as a soldier. Adolf Hitler refused this. Seyss-Inquart also never contested his responsibility and gave himself up voluntarily after the collapse. In case the legal opinion of the defense concerning the superior command is not shared by the court, even in regard to paragraph 8 of the charter, the total organization of the Reich on the one hand and the attitude of the Dutch people on the other must be taken into consideration in passing judgment on his administrative activity. The way in which Seyss-Inquart on principle came to terms with himself on his conflicting tasks, namely to represent the interests of the Reich on the one hand, and yet to take care of the population within the meaning of the Hague Convention on the other, is revealed by his attitude in this respect as follows :

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In the administration of Holland my client clearly allowed himself to be guided by the following legal conceptions :

The development of war technique particularly in air-warfare, the extraordinary extension of economic war, the expansion of the war into "total" and "indivisible war", the genesis of the conception of total blockade, partly made international law, -- as it was in effect in the years 1899 and 1907 at the genesis of the Hague Convention-- meaningless from the viewpoint of the clausula rebus sic stantibus, and partly because of new necessities and given conditions it proved to be absolutely incomplete and useless. Only a few remnants from olden times were still valid in the second world war.

The severity of this change is revealed particularly in respect to bombings of residential quarters made possible by the colossal development of explosives and the technique of flying and which found no fustification whatever according to previous law,. If they can be justified at all, it is possible only out of a concept of total war.

However, this development particularly drew the individual person into the war as an object last but not least under the influence of the Anglo-American concept of war.

Accordingly, enemy civilian population as well as the recources of the occupied regions during this development have become the war potential of the occupying force within the limits imposed by humanity.

A further limit is constituted by the general provision of international law that requisitioning these forces must be necessary for the purpose of war and thirdly this requisitioning must ex aequo et bono be reasonable.

Moreover, the totalitarian and indivisible nature of modern warfare forbids treatment of individual areas separately. It will no longer do to requisition the personal and economic forces of a definite area only for its necessities, as it is still prescribed by the Hague Convention for Land Warfare. Henceforth these forces must be at the disposal of the whole sphere of action of a belligerent country as oneunit, on the other hand they benefit from belonging to the whole.

Modern technical development, especially in the field of communications and traffic moreover causes the attitude towards another problem of warfare, namely, the so-called Partisans, to be faced by new and most grave tasks

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In contrast to the period of the first World War, the Partisan organization definitely assumed inconceivable proportions in the second World War and developed into an enormous danger for the fighting troops which at most can be compared with the Guerilla war of attrition against Napoleon I in Spain. The old international law by no means made sufficient provisions to parry this danger. As a matter of fact the prevailing principle when fighting the Partisans must be the security of the fighting troops at any price.

This means, for the army as well as for the occupation administration both the right and the duty to take the severest suppressive and preventive measures within the limits of reasonable expectation and humanity. My client discharged the duties of his office in accordance with these guiding principles, with the fixed notion that he was thereby complying with his duty according to the directives of the legal subject of international law, i.e., of the supreme Reich Leadership. Any thought of acting illegally or even of committing punishable acts was far from his mind. That has nothing to do with the applicability in this case of the principle that ignorance of the law excuses no one, for here no national penal law is concerned but international law, and it is not a question on the other hand of a legal error, but of a subjective conception of duty which may have gone astray here and there but was always credulous.

Now, in investigating in detail the individual administrative acts of the defendant in accordance with this basic exposition, it must be pointed out that the National Socialist administration, as everywhere in occupied territories but particularly in Germany proper, revealed an ever greater and more penetrating superorganization and at the same time an extremely tight centralization in Berlin. Consequently there were the following authorities in the Netherlands.

1.) The Reich Commissariat (Civil Administration and Protection of Reich Interests.)

2.) The Supreme Commander of the Wehrmacht and the various Commanders-in-Chief including their own Courts.

3.) The Police concerning which I shall speak later.

4.) Four Year Plan - Goering

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5.) Special Purpose Staff-Rosenberg

6.) General Labor Commitment-Sauckel

7.) Armament Ministry-Speer, and

8.) last but not least, the NSDAP with its offices and organizations.

Pursuant to the Fuehrer order, thus de jure, the Reich Commissioner was bound to obey absolutely the instructions of these central agencies, and he was not permitted to intervene in their measures. The record of history to be written will perhaps throw light on the question as to how great was the skill of the defendant to prevent some of them or at least how he toned them down. As regards the Dutch populayion, its attitude, as already mentioned, was completely hostile and the forces of the resistance movement, organized, equipped and directed through the Dutch Government in London, grew from one year to antoher. The defendant's actions should be considered against this background to reach a fair judgment.

I am now turning to the indictment and in outline I shall follow the schedule of the French prosecutor.

The first charge is the alleged violation of sovereignty of the country through introduction of the Reich commissiariat with its 4 general commissariats : annulment of civic liberties ; introduction of the leadership principle, and dissolution of legislative bodies and political parties. These measures cannot constitute a breach of international law. Inasmuch as Germany which is likewise one of the signatory powers of the IVth Hague Convention of 1907, based itself on the laws governing land warfare, and notwithstanding the lack of the all-embracing participation clause after entry into the war by the Soveit Union, the validity of the laws governing land-warfare with due consideration for restrictions referred to in the beginning of the above statements must be accepted for the Netherlands as well. Its fundamental elements do not seem broken. Asa result of the complete occupation of the countr the flight of the Queen and of the Ministers from the country, the highest governing power in civil affairs passed from the Crown and the Parliament to the occupying power, and with it to the Reich Commissioner. Through the unconditional capitulation of 10 May 1940, General Winkelmann, vested with special powers and left behind in the country, renounced his authority in every respect.

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Furthermore, it is the accepted rule for the occupying power to regulate the administration as it is demanded by its requirements, -under exclusion of the right to take any stop apt to deprive the country in advance of the final clarification of its fate. A specific recognition to that effect through the Highest Court of Holland took place according to the decision of 12 January 1942 submitted to me. The division of authority between the Reich Commissioner and the Commander of the Wehrmacht, as provided by the Fuehrer decree, is a matter pertaining to the internal segregation of jurisdiction applying to the occupying power. This has been specifically recognized by the British Manual of Military law (CH XIV Amendment 12 of 1936). The fact that the State Parliament was suspended, the activity of the State Council restricted to preparation of opinions in disputes on administrative matters and that, finally, parliamentary parties were dissolved, is likewise no violation of International law because during the period of occupation the occupying power itself decides how far the need for legislative

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measures and for amendment of the legislation of the country exists. As a rule, about 50 parties entered the contest for the 150 seats in the Dutch Parliament at every election. Due to the fact that the contesting parties not only were in accord in their antagonism toward the occupying power but frequently were active in the various resistance movements, their suspension and subsequent dissolution -which was only decreed on 5 July 1941- was the good right of the occupying power, all the more so as the country was on the direct path which the coming developments of the war were bound to follow and since an invasion was very likely. This made a rigid concentration in the administrative apparatus, under exclusion of all parliamentary obstructions and the potentialities which they held for enemy propaganda, imperative. If it is pointed out that this, on the other hand, encouraged the NSB, it might be answered in brief that the Reich Commissioner consistently refused the formation of a governent by this party. The fact that parties which were already in existence in the country or were to be newly formed, the ideology of which was firendly to the occupying power, were encouraged by the latter, is also not outlawed by international law. Inasmuch as no official administrative powers were vested in the NSB and since political organizations had no influence on the administration, it is also immaterial that in the year 1943 this party announced itself as the represnetative of the political will of the Dutch Nation. It always has been and still continues to be the practice up to this day that occupying powers encourage and assist political parties friendly to them.

The charge of Germanization is unjustified. By reason of its descent, the Dutch people always were considered to be Germanic and it is therefore not feasible to make Germans of them. A perusal of Dutch history shows us that for centuries the Dutch people always belonged to the Federation of the German Reich and he who roves through the country can still see in Groningen's coat-of-arms the German Reich Eagle, as well as Amsterdam's coat of arms carrying the emblem of the German imperial crown since 1489. The first and the last Salic Emperors, Konrad II and Heinrich V, died in Utrecht. It is but natural that in view of the blockade against the sea and the colonies, the occupying powers desired to direct the country towards Central Europe and it never was intended certainly not by the Reich Commissioner, to cut out the national traits and the independence of the Dutch.

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It was perfectly justified for the defendant to declare in his speech of 9 November 1943, in Utrecht, (document book 102), among other things :

"We ourselves would cease to be Europeans should we fail in our mission to maintain and to promote this rich luxuriance of characteristic and blood-bound cultures of the European people."

Equally unjustified is the charge of the French Prosecution in regard to pressure in the interest of Holland's entry into the war. There did not exist a ban against enlisting volunteers of Dutch nationality in the German Wehrmacht. Article 45 of the law on landwarfare merely forbids compulsory recruiting for war activity against the own fatherland. This did not make obsolete the decrees of the Dutch criminal law (referred to by the Prosecution) applicable to the person who takes up arms voluntarily, a decree which was strengthened during the war by Royal edict. The same holds true as regards regulations on citizenship for those volunteers and marriage to German nationals. Inasmuch as these orders of the Reich Commissioner could have legal value only within the limits of the German Reich, the interpretation of law that they do not constitute abuse of soveriegnty in the sense applied by the Prosecution can be maintained in good conscience. That a press had to be silenced which notoriously placed itself in opposition to the occupying powers goes without saying.

The French Prosecution points to another suppression of sovereignty thr removal of intellectual life as a result of the closing of universities and the demand for a declaration of loyalty remains within the framework of the convention governing Land Warfare, Article 45 an oath of allegiance, According to the wording of the declaration it is merely demanded to abstain from any action directed against the German Reich or its army. Inasmuch however, as the population of the occupied country is bound to obey the occupying power governing the State, this statement, which does not make an active demand, cannot be considered a violation of international law.

The organization of government was taken over almost entirely and maintained, despite an attitude of pronounced rejection, even animosity ; especially one refrained from interference in the field of the judiciary. The only reproach in this direction is the dismissal of the President of the Court of Justice at Leeuvarden.

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The defendant expressly declared to assume responsibility for this case, and he has the perfect right to do so. The occupying power can interfere in the field of the judiciary only when the purpose of the occupation is in jeopardy If a judge refuses administration of justice -even though the cause for his complaint was eliminated, as was the case in this instance- then the occupying power has the right to remove from office the judge concerned.

The French Prosecution then continues, asserting that the defendant initiated a series of acts of terror. In the course of the presentation of evidence on this point, we have heard what collective punishment was about. Kammergerichtsrat Rudolf Fritsch and President Joppich, further proved by their testimony that the defendant was extremely conscientious in the application of the right to grant pardon and that he restricted the infliction of capital punishment as much as possible. And as regards Police summary courts the defendant and the witness Wimmer have proved that this was a procedure applied in a few single cases only, headed by an official of the judiciary - the respective defendant having the right to use the services of a defense counsel freely appointed of Dutch nationality and that, furthermore, this procedure found application for two weeks only. Even at this time we still find in a considerably more severe form some such special type procedures f emergency purposes used by powers of occupation.

The elimination of regular courts and one of the main-points of the Prosecution is the question of hostages, which I must therefore discuss in detail. Dr. Nelte has already discussed its juridical aspect in general, an I refer to his statements. In RF 879 the prosecution has now chosen two particular cases. The so-called hostage-shooting at Rotterdam and the one after the attempt against the senior Leader of the SS and of the Police, Already in the course of his first interrogation by the plaintiff, the defendant referred to the first case of the Wehrmacht's demand for 25 to 50 hostages. The witness Wimmer confirmed that these hostages had been demanded by the Wehrmacht that through the defendant's influence this number was finally reduced to five and that the Senior SS and Police Leader was entrusted with the shooting.

The relation between the Wehrmacht and the Reichcommissioner, as well a the relation between the Wehrmacht and the Police, is regulated by the decree

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dated 18 May 1940 Reich Law Gazette No. 1, page 778, k376 PS in paragraphs 2 - 3.

In order to convict the defendant, the Prosecution submitted the accusation but not the testimony of General Christiansen. In the course of an interrogation the defendant did not take the oath.

The record proves that :

a) The order was issued by the Wehrmacht on account of grave cases of sabotage and was analogous with the so-called "Law governing hostages" in Belgium and France.

b) The arrest of the hostages then carried out by the German Police on the order of the Commander of the Wehrmacht in Holland. "An order is an orde

c) The German High Command or Command West persists in the execution of the orders notwithstanding all representations.

d) Execution by the Police.

e) Proclamation I made in the Juridical Department of the Headquarters of the Wehrmacht in Holland.

Proclamation II drafted by the Senior SS and Police Officers.

Would the Tribunal consider the justification of the defendant as standing the test in the event of his using the arguments of General Christianser for his justification ?

As to the second so-called hostage case, it is dealing with the consequences of all attempt directed in March 1945 against the senior SS and Police leader, SS Obergruppenfuehrer Rauter, the highest Police officer in Holland, who was directly subordinated to Himmler. Remembering the consequences of the murder of the tyrant Heydrich by the Czec Patriots in 1942, we ca well imagine Himmler in 1945, at the height of his power, avenging the plot against one of his nearest and most important lieutenants. It is likewise understandable that the defendant, as head of the administration ordered deterrent measures to be taken in the sense of general prevention after an attack had been made on one of his general Commissioners. He, knowever, did not demand any hostages but only the consummation of duridically closed criminal cases, No. RF 879 proves the truth of these assertions of the witnesses Schoengarth, Lagos, Kolitz and Gerbig, that only men sentenced to death and not 200 but 117 were shot, partly possibly before the originally fixed date of execution.

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This also is confirmed by the Criminal Commissioner Munt in D II of the report of the Dutch Government, and likewise Dr. Friedrich Wimmer, who was interrogated by the Court. In this case it is not at all the question of hostages in the original sense, but the justified execution of saboteurs, pilferers, etc., from the viewpoint of the occupation, which was called the shooting of hostages in order to terrify the population. The fact that the defendant achieved the cutting down of the number of 500 real hostages originally demanded by Himmler to 117 orders of execution can certainly not be a reason for calling him responsible for Himmler's cruelties.

The prosecution furthermore asserts that the defendant, in his capacity as Commissioner of the Reich, had agreed in, directed and supported the transfer of an enormous number of Dutchmen to Germany. The principal question of the employment of foreign workers has already been widely discussed by other defense counsels. May I be allowed to add a few remarks to this count of the indictment. According to my information received from the statistical Department, 300,000 to 500,000 men out of a population of 9 millions were out of work, a chronic situation in the economic life of the Netherlands, which was more or less rightfully considered one of the richest countries of Europe. At the time of the Reich Commissioner taking over governmental power he considered it his duty to deal with unemployment in the interests of order and peace.

It was evident that this could not be achieved according to liberal principles, the more so that even in countries adhering to the liberal economic order, the demands of the war period were directed unilaterally, as necessitated by war conditions. Until 1943 the labor commitment was effect according to the voluntary principle. The defendant himself explained that a certain compulsion was used. He had found great understanding in Minister Speer in particular for his plan of enabling the workers to be used in their home country by transferring German undertakings from the Reich to Holland.

In 1943, three classes of young unmarried men were called up by Labor offices, but not by compulsion. As certified by Lammers, the Reich Commissioner refused in 1944 the commitment of 250,000 workers who had been requested by the Reich. The man hunting project of the autumn of 1944, i.e. the mobilizing of the entire able bodied population, was, as contested by witnesses Hirschfeld, Schwebel and Timmer, a drive by the Wehrmacht, for which the defendant cannot be considered responsible. On the contrary, the fact must be expressly insisted upon that the Reich Commissioner diminished the hardship of these measures by the issue of 1,000,000 postponment certificates, and by urging a regulated transportation possibility as well as the mobilization of workers initiated by him, whereby it should not be overlooked that the steady growth of the opposition movement rightly caused uneasiness to the Wehrmacht, considering the grave danger for the occupation forces by the accumulation of people in the southwestern provinces.

To summarize, it must be juridically noted, that the defendant was subject to the orders of the central administration within the framework of the Four Year Plan, that but for such orders and demands he would never have sent workers to the Reich, and that he strongly opposed it as far as its execution was not in conformity with the laws of humanity.

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As to the next point of the Prosecution, the so-called economic looting of the country, it has likewise to be referred to the first basic interpretations. The confiscation of raw materials was carried out in the first day of the occupation within the framework of the Four Year Plan, with the collaboration of the Dutch authorities, who thus had the opportunity of diminishing unnecessary hardship. It is evident that the defendant would have preferred to keep the stocks within the compass of his own administration. The defendant insisted in every single case of requisition on proper compensation basis, and prevented the transfer of institutions, as for instance the Margarine factory Dotrecht or the Leyden Ice. works. As, under pressure of the Reich Commissioner, Goering promised that the Dutch people should not be treated worse than German citizens, it would appear according to a not too narrow interpretation, Article 53 of the Hague Convention of Rules of Land Warfare had therefore in this point been carried out by the defendant.

The reports of the Field Economy Officer with the Wehrmacht Commander in Holland, dated 9 October 1944 (NF 132), and of Lieutenant Haupt (3002 PS, 196 USA) prove that the confiscations were in the first instance the work of the Wehrmacht.

This latter shows that the difficulty of this whole position arises particularly from the fact that Reich Commissioner Seyss-Inquart is still here, notwithstanding that he has almos t resigned. This merely shows that the defendant always diminished or opposed any cases of hardship in this sphere to the best of his ability. The removal of stocks of raw material and rolling stock in the course of a total war after the invasion, and in view of the approaching enemy, is equally justified within the framework of International law.

The emergency situation created by the war called for the re-establishment of Dutch economy in Europe. Before the war,

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according to official statistics, 39% of the gainfully employed population were engaged in trade and industry, 23% in commerce and traffic, and 20% in agriculture. By being cut office from the rest of the world, the shipping industry was completely shut down and merely as an example it may be stated that 60% of the trade passing through Rotterdam-harbor consisted of German goods. The highly developed agriculture was a pronounced luxury cultivation, and dependent on articial fertilisers from South America and concentrated fodder from Canada. We have learnt from the testimony of Dr. Hirschfild, how relatively well Dutch agriculture and particularly the world famous cattle bredding have survivied the war. This was only possible through understanding collaboration of the Reich Commissioner and the local administration offices, and through their support by the defendant.

The alignment of economy in respect to the great space of Europe, which during the war was almost exclusively governed by Germany and her allies, offered without a doubt great possibilities of disposal for Netherlands trade and industry. It was therefore natural that also in a financial respect an assimilation of the economy to conditions in the German Reich or respectively to the European economic area, had to take place. A regulation of the financial economy was already necessary in view of the price policy. It would exceed the limits of these trials to state more details here.

May it only be pointed out to the Prosecution, that the defendant did not have any influence on the amount of the occupation costs, and did not even have any possibility of examining them; only the civilian budget was settled by the Reich Commissioner with the concent of the Reich and under the supervision of the Reich Treasury. In agreement with the Dutch agencies, civilian requirements were set at 3 million Guilders per month, which was not exceeded. On the contrary, at the end of 1943, a saving of 60 million

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Guilder resulted which remained in the Netherlands.

The lifting of the customs borders in inter-state traffic, was justified by the uniform price policy and could only have an effect favorable to the Netherlands. The relationship between Marks and Guilders was also determined by mutual agreement. A difference took place for the first time when the blocking of foreign exchange was rescinded. Here the views of the previous Dutch Chief, General Secretary Trip and those of the General Commandant Fischbeck differed. The defendant, who after all was not a finance man, submitted this important question to the central Reich authorities for their decision, and the defendant Goering has expressly stated during the presentation of evidence that he decided in favor of Dr. Fischbeck's opinion against the opinion of Reich Minister for Economy Funk. The defendant therefore cannot be charged with any criminal responsibility, not even that of a culpa in eligendo, if in the place of General Secretary Trip, who had resigned, he now appointed Rost van Toningen, who as former Commissioner of the League of Nations surely was an excellent finance expert.

The defendant Funk has also testified here that he has always considered the Clearing debts as true debts. In the Netherlands Government report it is pointed out, that the financial demands of the Reich reached approximately the same total in all occupied western territories and that only the methods differed. The method employed in the Netherlands would have brought the result, if the conclusion of the war had been successful to Germany, that the Netherlands would have had a real demand in the amount of 41 and 1/2 Billion Guilders against the Reich. The whole question therefore does not belong into a criminal trial, but into the peace negotiations. Furthermore, exact books were kept about everything, and so it may only be noted, that the conductors of the Netherlands Tramway Associations always marked down nicely and properly when a member of the Wehrmacht used the tramway with

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free ticket.

As far as the alleged looting of museums and libraries is concerned, as well as the looting of the royal property, it must be referred, for brevity's sake, to the results of the presentation of evidence which proved beyond doubt, that the defendant particularly attempted to safe-guard the world famous public art treasures and that he reduced arbitrary acts of the Reich Offices, if such occurred, to a minimum.

As far as the seizure of objects not essential for the conduct of war, as for instance, art treausres, libraries, etc., is concerned, the defendant did not participate in it. He acquired the few pictures which he bought for Vienna, on the open market. With trespect to the royal property he issued such instructions that this confiscation of property remained only a demonstration. This is also evidence from the Dutch governmental report. The repeatedly mentioned library Rosentaliana did not reach the Reich, as the defendant stopped the transport which had been carried out against his will, at Groningen. The case Arnheim seems likewise cleared up by the witnesses Dr. Hirschfeld and Mirmer, and the report of the field economic detachment. (Doc. 81).

The Jewish question has also a certain connection with the economic problems. Before I deal with this main subject, I must absolutely talk about the position of the police in the Netherlands. The Prosecution wants to prove that the police, and namely also the German police, particularly the Security Police, was subordinated to the defendant. Contrary to this attempt, is the fact that in all the signatory powers, with the exception of the Soviets, the police is actually a part of the civil, particularly the domestic administration. The situation in Germany was like this: de facto and not de jure. Himmler was independent, even more powerful than any other Minister, although he was nominally State Secretary of

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the Interior. Disciplines and centrally directed SS was subordinate to him in his capacity as Reichsfuhrer. The defendant Keitel testified on 5 April 1946, that since the outbreak of war, the SS became more and more an independent power factor in the Reich.

Je and his assistants had not been informed of Himmler's full powers, and Himmler and Heydrich had usurped the jurisdiction over life and death in the occupied countries through the frequently mentioned Fuhrer Order.

What was the situation now in the Netherlands?

The Fuhrer decree of 18 May 1940 already reveals that the German police was not part of the Reich Commissioner's organization, not was it subordinated to it. For it says in the decree:

"The German Police is at the Reich Commissioners disposal" which would not be necessary, if it were part of the Reich Commissione's office.

Thus even if the Reich Commissioner is the supreme governmental power in the civil sphere, the police is not included in it.

The Reich Commissioner publicized the administrative agencies in decree No.4, and that in such a way that the Dutch could clearly see what concerned them, without being affected by the differences of the Reich authorities. As regards the police, i.e. the German and Dutch Police, a second General Commissioner, as such, is appointed for Security affairs, (Senior SS and Police Officer). According to Article 5 of this decree the Senior SS and Police Officer has under his command:

a) the German Police and the Waffen SS (this statement is declaratory for the Dutch, for the Senior SS and Police Officer was appointed by the Fuhrer on Himmler's recommendation without the Reich Commissioner being consulted), Rauter presented himself to the Reich Commssioner as being already appointed, and in the

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opinion of the prosecution as well, the Reich Commissioner would never have been able to appoint the Commander of the Waffen SS.

b) The Dutch police (this fact is essential, since for the Dutch police the Reich Commissioner was competent).

The Dutch witness, Dr. Hirschfeld who was general secretary throughout the period of occupation, expressly confirmed that Rauter was directly subordinate to Himmler and that the apparent unity of the police and administration, according to the decree, did not exist in reality.

On page 21 of his book "Axis rule in occupied Europe", Raphael Lemkin defines the task of the police as being the liquidation of politically undesirable persons and Jews, just as the main responsibility for the seizure and deportation of labor for labor commitment in occupied countries was charged to the police.

THE PRESIDENT: Would that be a convenient time to break off?

(The Tribunal adjourned until 22 July 1946, 1000 hours)